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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. .....

JACKSONVILLE TERMINAL COMPANY,
A CORPORATION,

Petitioner,

—v.—

IRIS HODGE, AS ADMINISTRATRIX OF THE
ESTATE OF JAMES L. HODGE, DECEASED,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, OF THE STATE OF FLORIDA

Petitioner, Jacksonville Terminal Company ("Terminal Company") respectfully prays that a Writ of Certiorari issue to review the judgment of the District Court of Appeal, First District, of the State of Florida entered on March 30, 1972, in this matter.

OPINIONS BELOW

The opinion of the District Court of Appeal is not yet officially reported, but appears in Appendix A (pp. 1a-6a, *infra*). The Circuit Court of Duval County, Florida, rendered no opinion in this matter. Prior opinions of the District Court of Appeal and of the Florida Supreme Court

in the course of the litigation between the present parties are appended as Appendices C, D and E (pp. 8a-14a, 15a-20a and 21a-25a, *infra*).

JURISDICTION

The judgment of the District Court of Appeal is contained in its opinion entered March 30, 1972. (Appendix A) A timely petition for rehearing was denied on May 3, 1972. (Appendix B, p. 7a, *infra*) The petition for rehearing also requested the District Court of Appeal to certify the case to the Florida Supreme Court as containing a question "certified by the district court of appeal to be of great public interest." Fla. Const. Art. 5, § 4(2); Appendix F, pp. 28a-29a, *infra*. The District Court of Appeal refused so to certify the case and, accordingly, the decision of the District Court of Appeal is the decision of the "highest court of a State in which a decision could be had" as to this case.[1] 28 U.S.C. § 1257; *Nash* v. *Florida Industrial Comm'n*, 389 U.S. 235, 237 n. 1 (1967). This petition for certiorari is filed within 90 days of the date of denial of the petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Where the widow of a deceased railroad employee has pursued against the railroad a state statutory remedy for his fatal accident, under which she was afforded procedural and substantive rights at least as favorable as those under

[1] There are certain other bases set forth in the provisions of the Florida Constitution referred to which permit review by the Florida Supreme Court of decisions in the District Courts of Appeal under certain circumstances without certification by the lower court, but none of those circumstances was present here.

the Federal Employers' Liability Act ("FELA"), may she, after an adverse jury verdict, sue the railroad a second time under the FELA as administratrix to recover for the same fatal accident?

STATUTES INVOLVED

This case involves special Florida legislation imposing liability upon railroads, Fla. Stat. §§ 768.05 and 768.06; the Florida Wrongful Death Act, Fla. Stat. §§ 768.01 *et seq.;* the Federal Employers' Liability Act, 35 Stat. 65, as amended, 45 U.S.C. §§ 51 *et seq.;* and the Safety Appliance Act, 27 Stat. 531, as amended, 45 U.S.C. §§ 1 *et seq.* The pertinent provisions of all these statutes are set forth in Appendix F, pp. 26a-33a, *infra.* Also set forth in Appendix F are the pertinent provisions of Article 5, § 4(2), of the Florida Constitution.

STATEMENT

This suit arose out of a railroad grade-crossing accident on September 30, 1962, which resulted in the death of James L. Hodge. Hodge was driving his automobile across the Church Street public grade crossing of Terminal Company, which is a railroad operating in the terminal area in Jacksonville, Florida. Hodge drove onto the tracks at the crossing even though warning bells were ringing and red lights were flashing; his automobile was struck by the lead car of a "cut" of railroad cars being pushed across the crossing in a reverse movement by Terminal Company. Prior to Hodge's death, he had been employed by Terminal Company as a switchman.

In 1962, Iris Hodge, Hodge's widow, sued Terminal Company in a Florida State Circuit Court under the

Florida Wrongful Death statute. Fla. Stat. §§ 768.01, 768.02, Appendix F, pp. 26a-28a, *infra*. Under the Wrongful Death statute, she was entitled to proceed as widow and to recover not only for her direct loss but such amounts as were necessary to enable her to support the surviving children. *Slaughter* v. *Cook*, 195 So.2d 6 (Fla. App. 1967); *see also Director Gen. of Railroads* v. *Into*, 83 Fla. 377, 91 So. 269 (1922).

Because the accident involved a collision with railroad cars, Mrs. Hodge was entitled to rely upon, and did rely upon, the provisions of certain Florida legislation. This legislation provided for the rule of comparative negligence under which any negligence of the decedent which might have contributed to the accident together with the fault of the railroad, was available to the railroad only by way of reduction of damages. Fla. Stat. § 768.06, Appendix F, p. 26a, *infra*. Mrs. Hodge was also entitled to invoke, and did invoke, the provisions of another Florida statute which provided for a rebuttable presumption of negligence on the part of the railroad in cases involving damage done by "the running of the locomotives, or cars" of the railroad. Fla. Stat. § 768.05, Appendix F, p. 26a, *infra*. The defense of "assumption of risk" was not available to the railroad in this suit.[2]

Notwithstanding these liberal substantive and procedural features of the remedy which she had chosen, Mrs. Hodge was unsuccessful in making out her case before the jury in the Circuit Court: the four-day trial in June, 1963, resulted in a jury verdict for Terminal Company. Mrs. Hodge appealed to the District Court of Appeal of Florida on various grounds; but the District Court of Appeal

[2] While Terminal Company pleaded it as a defense, it was forthwith stricken by the Circuit Court.

affirmed the judgment entered on the jury verdict, observing:

> "The present appeal presents almost a perfect example of the validity of the fundamental principles that have developed through the centuries in our court system: the exclusive power in a jury of laymen to determine questions of fact in law actions, with the aid of legal guidelines furnished by the trial judge.... Under such a system the jury in the case at bar found for the defendant, and we think that there was sufficient competent evidence at the trial from which they, as reasonable men, could have lawfully found as they did. This is not to say, of course, that on the same evidence another jury might not have legally found, as the determiners of the facts, in favor of the plaintiff...." *Hodge* v. *Jacksonville Terminal Co.*, 170 So.2d 481, 484, Appendix C, pp. 13a-14a, *infra*.

The Florida court system was soon to be given an opportunity for "another jury" to find in favor of the plaintiff, on the same evidence. For while her appeal to the Florida District Court of Appeal was pending, Mrs. Hodge had commenced a second action (on which she had not caused any summons to be issued, presumably with a view to maintaining its secrecy) in the Circuit Court for Duval County. This suit invoked the remedies of the Federal Employers' Liability Act ("FELA") on the theory that Hodge was in the course of his employment as a switchman at the time of the fatal grade-crossing accident.[3] This

[3] The accident occurred at 10:20 p.m.; Hodge was due to report for work at 10:30. The respondent's theory of Hodge's "employment" at the time of his death was based on the fact that he was in his work clothes and carrying his switchman's lantern in his automobile at the time of the accident; that he might have been driving across the public crossing in question in order to reach his place of work; and that the railroad maintained a locker room where he might have changed into his working clothes (no one had seen him change), and from which he might have passed in his automobile over the public crossing to his place of work.

suit Mrs. Hodge brought, as provided by the FELA, as administratrix on behalf of herself and her children.

Even after she had commenced the FELA suit, Mrs. Hodge never suggested during the course of her action under the wrongful death and state railroad liability legislation that there was any question as to whether those statutes applied. However, after the affirmance in the Florida District Court of Appeal of the first-suit jury verdict for Terminal Company (and a denial of review by the Florida Supreme Court), Mrs. Hodge activated her already-filed FELA suit arising out of the same incident for which she had unsuccessfully brought suit under state law. The FELA suit alleged both negligence and violation of the Safety Appliance Act (through allegedly defective brakes) as a specification of liability under the FELA.

Terminal Company duly raised the effect of Mrs. Hodge's prior unsuccessful attempt to obtain recovery for the death of her husband through pleas of *res judicata* and collateral estoppel, based on the decisions of this Court as to the effect of prior state-law proceedings on a subsequent suit under the FELA. (See cases cited and discussed at pp. 8-10, *infra*.) The Circuit Court overruled these pleas and the case was once again tried to a jury. This jury disagreed with the result reached by the first jury and found in favor of Mrs. Hodge in the amount of $195,000.*

The Circuit Court set aside the jury verdict on the grounds that on one of the two theories of recovery submitted to the jury there was insufficient evidence to support the verdict. This action of the Circuit Court was reversed by the District Court of Appeal and by the Florida Supreme

* Of which $16,000 was awarded with respect to a nine-year-old child, $21,000 with respect to a five-year-old child and $25,000 with respect to a three-year-old child; the balance of the verdict, $133,000, was specifically for Mrs. Hodge as widow.

Court. *Hodge* v. *Jacksonville Terminal Co.*, 222 So.2d 483, 234 So.2d 645. (Appendices D & E, pp. 15a-20a and 21a-25a, *infra*)[8] Under Florida appellate procedure, the only question open on that appeal was the propriety of the Circuit Court's taking the specific action that it did in setting aside the verdict. Accordingly, after the Florida Supreme Court reinstated the jury verdict, a second appeal was taken, this time by Terminal Company, to the District Court of Appeal, to review Terminal Company's claims of error, including its contentions as to the effect of the prior state-law proceedings on Mrs. Hodge's ability to maintain the FELA suit.

The District Court of Appeal held that the adverse jury verdict and judgment in Mrs. Hodge's suit under the state wrongful death act did not estop her from bringing a second suit under the FELA. The theory of the court was that she was a different party in the two suits since she sued in the first as widow and in the second as administratrix. (Appendix A, pp. 4a-5a, *infra*) The District Court of Appeal cited this Court's decision in *Troxell* v. *Delaware L. & W.R. Co.*, 227 U.S. 434 (1913), for this proposition, holding that this Court's later decision in *Chicago R.I. & Pac. R. Co.* v. *Schendel*, 270 U.S. 611 (1926), was not in point. (Appendix A, pp. 4a-5a, *infra*)

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[8] From the Florida Supreme Court decision, Terminal Company sought certiorari from this Court, directed solely to the question whether the Circuit Court had acted properly in setting aside the verdict for insufficiency of the evidence. *Jacksonville Terminal Co.* v. *Hodge*, No. 571, O.T. 1970. This Court denied certiorari. 400 U.S. 904 (1970). Among other things, the brief in opposition argued that the judgment being sought to be reviewed was not "final" under 28 U.S.C. § 1257 because it did not finally dispose of the case for the reasons indicated by the text.

REASONS FOR GRANTING THE WRIT

1. In an extraordinary decision, the courts below permitted Mrs. Hodge to relitigate, after an adverse jury verdict against her had been affirmed by a state appellate court, the question of the liability of Terminal Company for her husband's death. In so doing, the Florida courts misapplied the standards established by the prior decisions of this Court as to the effect of a prior state-law proceeding upon a personal representative's suit under the FELA.

The sole reliance of the District Court of Appeal here was on certain language from this Court's opinion in its 1913 decision in *Troxell* v. *Delaware, L. & W.R. Co.*, 227 U.S. 434, 443. In *Troxell*, after her unsuccessful state-law suit, a widow, as administratrix, brought a suit under the FELA to recover for her husband's death. The Court held the subsequent suit under the FELA to be permissible because under the state-law basis of recovery, pursued initially, negligence by a fellow servant was not a ground for recovery; the contrary rule, of course, prevails under the FELA. 227 U.S., at 442-43. —The Court then, however, additionally observed that "to work an estoppel by judgment there must have been identity of parties in the two actions"; and the Court indicated that even though the beneficiaries of the two actions were the same, the fact that the first action was brought by Mrs. Troxell in her capacity as widow and the second in her capacity as administratrix was sufficient to prevent the adverse judgment in the first case from barring her recovery in the second. 227 U.S., at 443-44. It was clearly upon this language in the *Troxell* case, extensively quoted by respondent below (Brief of Appellee, District Court of

Appeal, pp. 16-17), that the District Court of Appeal relied here. See Appendix A, pp. 4a-5a, *infra*.

But this language in the *Troxell* case has long since been repudiated by this Court. In *Chicago, R.I. & Pac. R. Co. v. Schendel*, 270 U.S. 611 (1926), the effect of earlier proceedings under state workmen's compensation laws upon a subsequent FELA suit for wrongful death was considered. The administrator in the FELA action contended, on the basis of the *Troxell* decision, that a prior workmen's compensation action involving the widow in her individual capacity was not a bar to the administrator's subsequent suit under the FELA. This Court observed that: "The fact that the party impleaded, under the state law, was the widow, and, under the Federal law, was the personal representative, does not settle the question of identity of parties. That must be determined as a matter of substance and not of mere form." 270 U.S., at 618. This Court held that since the beneficiary of the actions was the same, the first action barred the administrator's suit under the FELA. 270 U.S., at 618-21. As to *Troxell*, the Court held that that decision was in fact based upon the point that in the state-law claim, fellow-servant negligence was not a ground of recovery, as it is under the FELA; the expressions as to the nonidentity of parties where the widow brought the first action as such and brought the second action as administratrix were treated as dicta; and the dicta were disapproved. 270 U.S., at 622.*

* The District Court of Appeal, in its concentration upon matters of form rather than substance, in what evidently it thought was a hypothetical exposing some fallacy in petitioner's position, asked and answered the following question: "Finally, assuming some other individual or corporate entity other than Mrs. Hodge had been appointed administrator, would estoppel have been available to the Railroad? We conclude not." (Appendix A, p. 5a, *infra*) —But this was the very situation involved in the *Schendel* case; there, the widow, Mrs. Hope, had been involved in the prior

And in the later decision in *Baltimore S.S. Co.* v. *Phillips*, 274 U.S. 316 (1927), this Court again characterized *Troxell* as resting solely upon the "narrow ground" of the failure of the state-law remedy there to provide a recovery for the negligence of a fellow servant. The Court in *Phillips* pointedly observed that *Troxell's* "authority must be confined accordingly. . . ." 274 U.S., at 323.

The tests established by the *Troxell* and *Schendel* cases, taken together, for the permissibility of a second suit under the FELA after an unsuccessful suit under state law demonstrate that the subsequent FELA suit was barred here. For unlike the state-law remedy discussed in the *Troxell* case, the state-law remedy pursued by Mrs. Hodge here was at least as favorable to her as her remedy under the FELA. In both cases, the rule of comparative negligence prevails; thus, even if the decedent's negligence predominated in causing the accident, under both the Florida railroad liability statute (Fla. Stat. § 768.06) and the FELA (§ 3), the sole effect would be a diminution of damages. See Appendix F, pp. 26a and 30a, *infra*. Under neither remedy is the defense of "assumption of risk" available; a plea of "assumption of risk" by Terminal Company was stricken in the suit under the Florida Wrongful Death Act and the special Florida railroad liability statute. Again, under the Florida statute, as under the FELA, a violation of the Safety Appliance Act is a substantive basis, without negligence, of liability on the part of the railroad—although Mrs. Hodge did not choose to allege a violation of the Safety Appliance Act

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proceeding, but the administrator in the FELA suit was a court-appointed administrator, one Schendel. Nonetheless, since the real parties in interest were the same, this Court held that the earlier proceedings were a bar to the maintenance of the FELA suit.

in her suit under the Florida legislation. See *Caudell* v. *Florida E.C. R. Co.*, 201 So.2d 583 (Fla. App. 1967); *Jacksonville Terminal Co.* v. *McCullough*, 179 So.2d 850 (Fla. App. 1965).[7] Indeed, under the special Florida railroad liability statute, the remedy was *more* favorable to Mrs. Hodge than that under the FELA, for the Florida railroad liability provisions (Fla. Stat. § 768.05, Appendix F, p. 26a, *infra*) create a rebuttable presumption of negligence on the part of the railroad; no similar presumption exists under the FELA, and the plaintiff has the burden of proof and of jury persuasion with respect to this element of her case.

Whether the case is viewed under the formal rubric of collateral estoppel or of *res judicata*, the authorities—even apart from this Court's decision in *Schendel*—teach that the second suit is barred here. Collateral estoppel precludes relitigation of the same factual issues litigated in the first case. *Ashe* v. *Swenson*, 397 U.S. 436 (1970); *Partmar Corp.* v. *Paramount Picture Theatres Corp.*, 347 U.S. 89 (1954); *United States* v. *International Bldg. Co.*, 345 U.S. 502 (1953). Here in the first case, it was determined that the accident occurred without the fault of Terminal Company and entirely through the fault of Hodge. Under the *res judicata* rubric, a second suit cannot be brought as to any matter litigated in the first suit or which could have been litigated but was not. *Heiser* v. *Woodruff*, 327 U.S. 726 (1946); *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U.S. 371 (1940); *Acree* v. *Air Line Pilots Ass'n*, 390 F.2d 199 (5th Cir. 1969). Thus the addi-

[7] "The Federal Safety Appliance Act extends its benefits not only to employees of the railroad but to non-employees, passengers, and travelers of the highway at railroad crossings." 179 So.2d, at 851. *See also Brady* v. *Terminal Railroad Ass'n*, 303 U.S. 10, 14 (1938).

tion of the Safety Appliance Act theory to the second suit does not change matters since that theory could have been asserted in the first. The second suit must therefore be barred on either approach.

2. The court below seems to have based its decision, at least in part, not solely upon the formal nonidentity of Mrs. Hodge the widow on the one hand and Mrs. Hodge the administratrix on the other, but on a supposed difference in the beneficiaries of the two actions. (Appendix A, p. 5a, *infra*) The court stated that Mrs. Hodge's state-law action was solely for the benefit of Mrs. Hodge, while the second action Mrs. Hodge brought, under the FELA, is stated by that Act (Appendix F, p. 29a, *infra*) to be for the benefit of the widow and the surviving children. In the second suit, relatively small separate awards were in fact made for the benefit of the three children. But this argument is without substance.

In the first place it ignores the fact that more than two-thirds of the FELA judgment was solely for the benefit of Mrs. Hodge. Even if there were some substance to this position, the result of it should be that only the amount awarded in the separate portions of the verdict applicable to the three children could stand, not the $133,000 specifically awarded in the FELA suit for the personal benefit of Mrs. Hodge.

But the defect in the argument is more fundamental. The beneficiaries of the two actions were, as a matter of substance, the same. The law of Florida does not preclude recovery for the children's losses by reason of the wrongful death of their father because their mother is the plaintiff in the action. Rather, under Florida law, Mrs. Hodge, had her suit persuaded the jury, would have recovered

as an item of damages the loss of support of her husband for the children. *Slaughter* v. *Cook, supra; Director General of Railroads* v. *Into, supra.* Indeed, at her request, the court charged the jury in the state-law wrongful death suit that Mrs. Hodge was entitled to recover for the "loss of support which her husband is legally bound to give the wife, and minor children during their minority. . . ."[8] While Mrs. Hodge would have recovered that amount in her own name, she would have been, as a matter of Hornbook law, under a duty to apply the recovery to the support of her children. See 24 Fla. Jur. p. 155, § 10. While in the FELA suit, Mrs. Hodge as administratrix received separate awards for the support of her children as well as for her own support, it is well-established law in Florida that she could resort to the awards to the children in order to support them. See *Osborne* v. *Van Horn,* 2 Fla. Rep. 360 (1848).

As a matter of substance, the case is clear. Both remedies provided a recovery for the losses sustained by the widow and the children. —This case does not involve any question, for example, of a recovery by parents or collateral relatives. In both the state-law action and the FELA action, the measure of damages is the loss to the widow and the children incurred by reason of the father's death. Here again, the lower court erected a purely formal distinction—based on the fact that in the second suit a portion of the award was specifically allocated to each of the children—in order to permit the second suit to be prosecuted by Mrs. Hodge notwithstanding her adverse jury verdict in the first suit.[9]

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[8] Transcript of state-law wrongful death action trial, p. 351.

[9] The Court in *Schendel* indicated that even had the rights of "additional beneficiaries" been involved in the second suit, the ques-

3. There was some suggestion made by respondent below, although not reflected in the opinion of the court below, that the FELA suit could be prosecuted in any event by Mrs. Hodge because the court in the state-law suit had no "jurisdiction", inasmuch as the FELA suit determined that Hodge was within the scope of his employment at the time of his fatal accident. To be sure, the state-law remedy could not be pursued if it were found that Hodge was an employee in interstate commerce at the time of his fatal accident. See *New York Cent. R. Co.* v. *Winfield,* 244 U.S. 147 (1917); *New York Cent. & H.R.R. Co.* v. *Tonsellito,* 244 U.S. 360 (1917). But this theory cannot sustain the action of the court below. The theory under which the court in the state-law suit proceeded—which was the theory of Mrs. Hodge's complaint, unchallenged by Terminal Company—was that Hodge was not in the course of his employment at the time of the fatal accident, but was in the same status as any nonemployee motorist crossing the Church Street crossing. Since the judgment in the state-law case was entered first, it precludes a subsequent action on the theory that Hodge was really an employee at the time of the accident. See *Durfee* v. *Duke,* 375 U.S. 106 (1963); *Stoll* v. *Gottlieb,* 305 U.S. 165 (1938); *Chicago, R.I. & Pac. R. Co.* v. *Schendel, supra,* 270 U.S., at 616-17; *Landreth* v. *Wabash R. Co.,* 153 F.2d 98 (7th Cir. 1946); see also *Davis* v. *Department of Labor,* 317 U.S. 249 (1942). This rule would have been applied even had the issue of employment been controverted in the earlier case; surely

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tion presented would still not be one resolved by the *Troxell* case so long as the widow's interest was involved in both cases. See 270 U.S., at 622. Thus, even if the present case is a case involving "additional beneficiaries", it would still present an issue which should be determined by this Court. However, for the reasons indicated in the text, this is not an "additional beneficiary" case, but one where the court below simply refused to follow *Schendel.*

there is no reason to give Mrs. Hodge a second attempt to convince a jury that the railroad was at fault in the accident because the railroad did not controvert her theory in the first suit that her husband was not in the course of his employment at the time of his fatal accident.

4. Neither is there any merit to the suggestion made by respondent below that the failure of Mrs. Hodge to allege a violation of the Safety Appliance Act in the first suit permits her to try her case to a second jury. Violation of that Act was available to her as a basis of liability in the first suit. See pp. 10-11, *supra*. The violation of the Safety Appliance Act alleged is simply an alternative to common-law negligence as a basis for liability, whether under the Florida legislation or under the FELA. See *Carter* v. *Atlanta & St. A.B.R. Co.*, 338 U.S. 430 (1949); *Urie* v. *Thompson*, 337 U.S. 163 (1949); *Jacobson* v. *New York, N.H. & H.R. Co.*, 206 F.2d 153 (1st Cir. 1953), *aff'd per curiam*, 347 U.S. 909 (1954); *Jacksonville Terminal Co.* v. *McCullough*, *supra*. As this Court observed in a somewhat similar case where it was contended that successive suits over the same personal injuries could be brought on different theories of the defendant's fault, the "cause of action" determined in the first suit is simply "the injury under the circumstances under which it took place." *Baltimore S.S. Co.* v. *Phillips*, 274 U.S. 316, 322 (1927). For *res judicata* purposes there was a unitary right to recover here for Hodge's death. As this Court put it in the *Schendel* case: "Hope's [the employee's] death as the result of the negligence of the railroad company gave rise to a single cause of action, to be enforced directly by the widow under the state law, or in the name of the personal representative, for the sole benefit of the widow under the Federal law, depending upon the character of the commerce in which

the deceased and the company were engaged at the time of the accident." 270 U.S., at 617-18. See also *Heiser* v. *Woodruff, supra; Chicot County Drainage District* v. *Baxter State Bank, supra; Acree* v. *Air Line Pilots' Ass'n, supra.*

Had Mrs. Hodge entertained any question as to which remedy she should have pursued, she could have alternatively pursued both her state-law remedy and her remedy under the FELA in the first action. For the Florida Rules of Civil Procedure make it plain that: "a party may also state as many separate claims or defenses as he has, regardless of consistency. . . ." Fla. Rules Civ. Proc. 1.110(g). The bringing of successive suits here was not caused by any procedural necessity but simply by Mrs. Hodge's desire to have a second chance to prove before a second jury what she failed to prove to the first. Certainly even a widow, suing for wrongful death, is entitled only to one jury trial under an appropriately broad remedy, such as was provided here either by the Florida legislation or the FELA.

The departure from the decisions of this Court in the *Schendel* and *Phillips* cases, and the reliance of the court below on the repudiated dicta in the *Troxell* case, indicate that the court below has decided a Federal question of substance in a way not in accordance with the established decisions of this Court. There are, as the cases indicate, numerous situations where the status of a railway employee as such at the time of his accident is in question.[10] The decision of the court below would permit, in cases of fatal injury, the pursuit of successive suits on behalf of the

[10] See the more than 50 such reported cases collected and reviewed in *Annot.*, 76 A.L.R.2d 1215, 1257-76 (1961). See also the twelve pages of fine print of annotations of such cases set forth in 45 U.S.C.A., notes 271 through 282 following § 51, pp. 249-60.

employee's representative, one under the state-law ground and the other under the Federal, at least in those cases where the formalities as to the plaintiff and beneficiaries under the state wrongful death act and under the FELA could be said to differ somewhat. This case is accordingly of importance to more than its particular parties.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

ADAM G. ADAMS, II
1116 Barnett Bank Building
Jacksonville, Florida 32202

DENNIS G. LYONS
DAVID BONDERMAN
1229 Nineteenth Street, N.W.
Washington, D. C. 20036

Of Counsel:

ADAMS & ADAMS
Jacksonville, Florida

ARNOLD & PORTER
Washington, D. C.

July, 1972

APPENDICES

APPENDICES

APPENDIX A

Opinion and Judgment of District Court of Appeal of Florida—March 30, 1972

IN THE

DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

JANUARY TERM, A. D. 1972

Case No. N-524

JACKSONVILLE TERMINAL COMPANY, a corporation,

Appellant,

—vs.—

IRIS HODGE, as Administratrix of the Estate of James L. Hodge, deceased,

Appellee.

Opinion filed March 30, 1972.

An Appeal from the Circuit Court for Duval County. MARION W. GOODING, *Judge.*

RAWLS, *J.*

The dispute between these parties has been fully litigated. In a separate wrongful death action appellee Iris Hodge, as the widow of decedent, was unsuccessful in her action against the Railroad.[1] While the foregoing cause

[1] Hodge v. Jacksonville Terminal Company, 170 So.2d 481 (1 Fla. App. 1965).

was pending on appeal in this court Iris Hodge, as Administratrix of the Estate of her deceased husband, filed the instant cause against appellant Railroad, invoking the provisions of the Federal Employers Liability Act[2] and the Safety Appliance Act.[3] The cause was tried to a jury which rendered a verdict in favor of appellee in the sum of $195,200.00. The trial judge granted the Railroad's motion for new trial upon several grounds which was affirmed in part and reversed in part by this court.[4] The Supreme Court granted certiorari to Iris Hodge, quashed that part of our opinion affirming the trial judge's order granting a new trial and directed this court "to remand to the trial court with instructions to enter an appropriate judgment on the jury verdict."[5] Pursuant to our mandate complying with the Supreme Court's directions, the trial court entered its final judgment for appellee; hence, this appeal by the Railroad on the merits of the trial. We will not again detail the facts, for same may be gleaned from the prior cited cases.

Appellant poses five points, viz.:

1. Did the court err in holding that the verdict and judgment in Case No. 62-1966-L is not a bar to this action?

2. Did the court err in ruling that decedent was, at the time of the fatal accident, an employee, within the meaning of 45 U.S.C. §§51-60, employed by defendant in interstate commerce and in not submitting that issue to the jury?

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[2] 45 U.S.C. §§51-60.

[3] 45 U.S.C. §9.

[4] Hodge v. Jacksonville Terminal Company, 222 So.2d 483 (1 Fla. App. 1969).

[5] Hodge v. Jacksonville Terminal Company, 234 So.2d 645 (Fla. 1970); cert. denied 400 U.S. 904, 27 L. Ed.2d 141, 91 S. Ct. 142 (1970).

3. Did the court err in charging the jury that decedent "shall not be held to have assumed the risk of his employment" under the facts of this case?

4. Did the court err in the admission of evidence showing a "custom and practice" of Terminal Company employees ignoring crossing signals and charging the jury that such practice "may be deemed" to constitute a waiver of defendant's "right to expect that its employees would adhere to such safety precaution"?

5. Did the court err in denying defendant's motion for new trial where evidence affirmatively shows that the verdict is grossly excessive and was motivated by passion, bias, or some other improper motive?

The points on appeal will be considered separately.

Appellant Railroad vigorously contends that appellee Iris Hodge is estopped to deny jurisdiction of this court by reason of the principles of res adjudicata and estoppel by judgment. In support of this theory, it points out that Mrs. Hodge, in filing the wrongful death action, necessarily elected to treat the factual situation as one where her husband had not yet commenced his employment on the night of his death. The Railroad then reasons that jurisdiction of the trial court in the instant case depends entirely on the legal premise that the wrongful death action was a nullity. In Gordon v. Gordon,[4] the landmark case from this jurisdiction upon the subject of res adjudicata and estoppel by judgment, it is stated:

"The difference which we consider exists between res adjudicata and estoppel by judgment is that under res adjudicata a final decree or judgment bars a sub-

[4] Gordon v. Gordon, 59 So.2d 40, 44 (Fla. 1952); cert. denied, 344 U.S. 878, 97 L. Ed. 680, 73 S. Ct. 165 (1952).

> sequent suit between the same parties based upon the same cause of action and is conclusive as to all matters germane thereto that were or could have been raised, while the principle of estoppel by judgment is applicable where the two causes of action are different, in which case the judgment in the first suit only estops the parties from litigating in the second suit issues—that is to say points and questions—common to both causes of action and which were actually adjudicated in the prior litigation."

The Railroad readily concedes that the defense of res adjudicata is not available because the first and second Hodge cases involve different causes of action.[7] As stated in Gordon, the doctrine of estoppel by judgment is applicable where the judgment in the first suit estops the *party* from litigating in the second suit. The Railroad insists that Iris Hodge is the same *party* in each suit. If such was the case, its contention would be well founded. We disagree.

Troxell v. Delaware L. & W. R. Co.[8] is on all fours. The Federal Supreme Court there held that a judgment by a widow in her individual capacity which was prosecuted

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[7] We note that appellant Railroad attempts to recede from this position in its reply brief. As stated in Appelman's Approved Appellate Briefs (1958), §6.15:

"Appellant's Reply Brief—Limitations Upon Reply Briefs

". . . One can restate his original position succinctly and reemphasize it in the court's mind . . .

"He [appellant] may not, of course, advance new arguments . . ."

Also see Seaboard Coast Line Railroad Co. v. Industrial Contracting Company, Inc., Case No. 71-16, opinion filed March 9, 1972 (4 Fla. App. 1972), not yet reported.

[8] Troxell v. Delaware L. & W. R. Co., 227 U.S. 434, 57 L. Ed. 586, 33 S. Ct. 274 (1913).

and tried on the theory that it involved a cause of action under the state law, is not a bar to a subsequent action by the widow as administratrix brought under FELA. In the two causes filed arising out of this accident, the facts are the same but the parties are not the same, and thus Chicago R. I. & P. R. Co. v. Schendel[9] is not in point. Florida law makes a substantive distinction. A recovery by a widow in a wrongful death action inures solely to the benefit of the widow. In an action by an administrator under FELA the estate must maintain the action for the use and benefit of the widow and the minor children. Finally, assuming some other individual or corporate entity other than Mrs. Hodge had been appointed administrator, would estoppel have been available to the Railroad? We conclude not.

Next, the Railroad contends that the court erred in ruling as a matter of law that decedent was engaged in its employment at the time of his death so as to bring him within the purview of FELA. The undisputed facts are that Hodge was dressed in his work clothes, had in his possession his switchman's lantern, and had been seen seven minutes prior to the accident on another portion of his employer's property. These admitted facts fall squarely within the cases of Carter v. Union R. Co. and Erie R.R. v. Winfield.[10] Further, testimony of witnesses concerning the use of a locker room by employees supports the trial judge's holding as a matter of law that decedent was clearly within the course of his employment at the time he met his death. The point is without merit.

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[9] Chicago R. I. & P. R. Co. v. Schendel, 270 U.S. 611, 70 L. Ed. 757, 46 S. Ct. 420 (1926).

[10] Carter v. Union R. Co., 438 F.2d 208 (3 Cir. 1971); and Erie R.R. v. Winfield, 244 U.S. 170, 61 L. Ed. 1057, 1065, 37 S. Ct. 556 (1917).

As to the point concerning the instruction by the trial judge "that assumption of risk is no defense to railroad's negligence," it is noted that 45 U.S.C. §54 provides, inter alia:

> ". . . This Act further provides that in any action brought against any common carrier, under or by virtue of any of the provisions of this Act to recover damages for injury to, or the death of, any of its employees, such employees shall not be held to have assumed the risk of his employment in any case where such injury or death resulted, in whole or in part, from the negligence of any of the officers, agents or employees of such carrier."

The Railroad adduced evidence that decedent, an experienced switchman, had exposed himself to the "risk" and thus we hold that under the evidence the trial judge was justified in giving the charge.[11]

As to appellant's points 4 and 5, we will not further belabor this opinion other than to hold that, when considered in light of this extensive record, neither point demonstrates such error that would cause reversal.

The judgment is affirmed.

SPECTOR, *Chief Judge,* and JOHNSON, *J.,* concur.

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[11] Atlantic C. L. R. Co. v. Burkett, 192 F.2d 941 (5 Cir. 1951).

APPENDIX B

Order Denying Rehearing—May 3, 1972

IN THE

DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

JANUARY TERM, A. D. 1972

Case No. N-524

JACKSONVILLE TERMINAL COMPANY,
a corporation,

Appellant,

—VS.—

IRIS HODGE, as Administratrix of the Estate of
JAMES L. HODGE, Deceased,

Appellee.

ORDER

Petition for rehearing having been considered,

IT IS ORDERED that the petition is hereby denied.

WITNESS the Honorable Sam Spector, Chief Judge, and Seal of the Court this 3rd day of May, A. D. 1972.

RAYMOND E. RHODES
Clerk

APPENDIX C

Opinion of District Court of Appeal of Florida in Wrongful Death Action Brought by Mrs. Hodge Under Florida Statutory Provisions—December 29, 1964

DISTRICT COURT OF APPEAL
OF FLORIDA

First District

Dec. 29, 1964

Rehearing Denied Jan. 20, 1965

No. E-363

Iris Hodge, a widow,

Appellant,

—v.—

Jacksonville Terminal Company,
a corporation,

Appellee.

Carroll, Donald K., *Judge.*

The plaintiff in a wrongful death action has appealed from a final judgment entered by the Circuit Court for Duval County, based upon a jury verdict for the defendant.

A principal question raised for our determination in this appeal is whether the trial court erred in giving its instruction to the jury concerning the legal effect of negative evidence, in the light of the conflicting testimony of witnesses on certain points at the trial.

The plaintiff-appellant filed this action for the wrongful death of her husband, who was killed in 1962 while operating his automobile across a railroad grade crossing when it was struck by a train or "cut" of railroad cars, which was operated and controlled by the defendant, Jacksonville Terminal Company.

To the plaintiff's complaint the defendant filed its defenses, denying the negligence charged and alleging that the collision occurred solely or in part as a result of the deceased's own negligence. Another defense was assumption of risk.

At the end of four days of trial the jury brought in a verdict for the defendant, and the trial court thereupon entered the final judgment appealed from. The court later entered an order denying the plaintiff's motion for a new trial, which order is also appealed from herein.

Without attempting to set forth in detail the evidence adduced at the trial (comprising three volumes of the transcript and 544 legal-size pages), we mention the following as undisputed facts that show the setting out of which arose the legal problems before us: At about 10:20 o'clock on the night in question the decedent, who was a switchman employed by the defendant, was driving his automobile easterly on Church Street in the City of Jacksonville across the defendant's tracks, running north and south, near where he was to begin work in the defendant's railroad yard. After crossing three separate storage tracks about 75 feet west of the defendant's tracks, his automobile was struck by the leading end of a train or "cut," which was backing up in a northerly direction on one of the defendant's tracks. The tracks at this crossing, which is located a short distance in a northwesterly direction from the Jacksonville Terminal Station, were frequently used by the defendant in its switching operations. The evidence

further showed that at the time of the collision the decedent was employed by the defendant as a member of a train crew which was assigned duty at or near the crossing in question. He had been employed by the defendant for approximately ten years and was thoroughly familiar with the layout of the tracks and the usual movements of the trains in the yard at that point. Another employee of the defendant testified, without contradiction, that the street crossing lights were flashing and the warning bells at the crossing were ringing, but the decedent did not stop.

As frequently occurs at trials of railroad grade crossing cases, there was a conflict of testimony at the trial in the case at bar as to whether the train crew blew a warning whistle and showed a warning light before the collision. The foreman, who was in control of the railroad cars' movement, testified that he was riding in the vestibule of the most forward car and that he sounded a compressed air whistle, with a loud, clear sound, continuously from a distance of 500 feet from the crossing, and that the vestibule was lighted by the white light of a switchman's lantern. About 12 witnesses testified that they heard the whistle and saw the light; others testified that they saw the light but did not hear the whistle; while still others testified that they heard the whistle but did not see the light.

Out of this conflict between the positive and negative testimony concerning the whistle and the white light grew one of the principal points in this appeal—whether the trial court properly charged the jury concerning the relative weights to be given positive and negative evidence.

At the defendant's request, the trial court included the following in its instructions to the jury:

> "Where negative testimony is relied upon to contradict positive evidence, it should appear that the

negative statements were made by persons whose attention was directed to the facts inquired about, that they were watching, looking and listening for the fact; not only that the opportunity for observing the fact existed, but their attention must have been directed to it. The mere negative testimony of a witness that he did not hear the whistle blow and did not see the light does not overcome positive testimony that the whistle was blowing and the light was burning."

In her brief the appellant contends that the giving of the foregoing instruction, in view of the evidence in this case, constitutes reversible error under the decision in Tyus v. Apalachicola Northern Railroad Company, 130 So.2d 580 (Fla. 1961). In reply, the appellee contends in its brief that the cited case stands as authority for the giving of the said instruction. We agree with the appellee's position in this matter.

Like the case at bar, the Tyus case involved a railroad crossing accident, and the testimony of witnesses at the trial was in conflict as to whether the railroad crew gave warning signals while the train was approaching the crossing. In its opinion the Supreme Court of Florida had occasion to discuss the probative force of negative evidence that contradicts positive evidence. The Supreme Court quoted the following statement from an earlier decision as in accord with reason, logic, and the great weight of authority:

"When negative testimony is relied upon to contradict positive evidence, it should appear that the negative statements were made by persons whose attention was directed to the fact that they were looking, watching and listening for the fact. Not only that

> the opportunity for observing the fact existed, but that their attention was directed to the fact * * *."

The Supreme Court then explained the gist of this rule as follows:

> "The gist of our rule in relation to negative testimony in the face of positive testimony to the contrary is that if a jury decides that the attention of the witness whose testimony is negative in character, is actually directed to the fact or situation, about which he later testifies, regardless of the reason therefor, said jury may consider such negative testimony and accord to it the weight it may deem proper."

In addition, the Supreme Court recognized the fundamental rule concerning the function of the jury in comparative negligence cases (such as the instant case), saying:

> "The true query before us is whether, if there be conflicting testimony on the question of the defendant's negligence in a tort action, particularly wherein the comparative negligence rule is applicable, is such question for the jury or may it be determined by the court as a matter of law. Not only is this question in this jurisdiction absolutely within the province of the jury to determine, but such is the universal rule."

Applying what we believe to be the doctrine announced in the Tyus case, we think that the evidentiary situation created by the conflict between the positive and negative testimony concerning the train crew's blowing of the whistle and flashing the white light before the collision, made it most appropriate for the trial court to try to enlighten the jury through an instruction as to the rule which the

courts have worked out in order to aid the jury in weighing the relative merits of conflicting positive and negative testimony. The fact that the giving of such an instruction might in a given case be more advantageous to one party than to the other is, of course, not a matter for consideration by the courts. We hold that the giving of the charge objected to by the appellant did not constitute a reversible error under the circumstances shown in this record.

Another important point raised by the appellant in this appeal is whether the trial court erred in refusing to admit evidence at the trial to the effect that the defendant's own rule prescribing a certain speed limit was applicable to the train or cut involved in the said collision, and erred in failing to rebuke or stop the defendant's counsel from arguing to the jury that the said speed limit was not applicable in the case at bar. We have examined the rule in question and find that its language is not clear in its statement of the exact circumstance that must exist before the said speed limit shall apply. In any event, we are not prepared to say that the trial court committed reversible error with respect to the applicability of the rule in question, and the burden in an appeal of this kind falls upon the appellant to demonstrate reversible error.

The present appeal presents almost a perfect example of the validity of the fundamental principles that have developed through the centuries in our court system: the exclusive power in a jury of laymen to determine questions of fact in law actions, with the aid of legal guidelines furnished by the trial judge; and the broad discretion in the trial judge in the making of rules designed to help the jury in arriving at the truth in the factual situation proven by competent evidence, in order that the ultimate object of the courts—to ascertain the truth and accomplish justice under the law—may be attained as often as humanly pos-

sible. Under such a system the jury in the case at bar found for the defendant, and we think that there was sufficient competent evidence at the trial from which they, as reasonable men, could have lawfully found as they did. This is not to say, of course, that on the same evidence another jury might not have legally found, as the determiners of the facts, in favor of the plaintiff. This due process extends to the appellate level. Here both parties have brilliantly argued their respective positions, in their oral arguments before this court and in their written briefs.

Finding that the above-discussed points and other points raised in this appeal are without substantial merit, the final judgment and the order appealed from must be and they are

Affirmed.

WIGGINTON and RAWLS, *JJ.*, concur.

APPENDIX D

Opinion of District Court of Appeal of Florida in Connection with the Appeal by Plaintiff in Mrs. Hodge's Suit Under the FELA—May 13, 1969

DISTRICT COURT OF APPEAL
OF FLORIDA

First District

May 13, 1969

Rehearing Denied June 5, 1969

No. K-19

Iris Hodge, as Administratrix of the Estate of James L. Hodge, Deceased,

Appellant,

—v.—

Jacksonville Terminal Company, a corporation,

Appellee.

Spector, *Judge.*

By this appeal we are called upon to review an order granting the defendant a new trial after a jury verdict of $195,200 in a two-count action brought by appellant under the Federal Employers' Liability Act, 45 U.S.C.A., Section 51, et seq., and under the Safety Appliance Act, 45 U.S.C.A., Section 9.

The verdict was rendered for damages to appellant individually as surviving widow and to the minor children on account of the death of their father, an employee of the defendant terminal company.

Appellant's decedent, James L. Hodge, died as a result of injuries sustained in a collision between his car and a "cut of seven cars and three diesel engines" being operated by a crew of the appellee terminal company at the Church Street grade crossing in Jacksonville, Florida. After changing into his work clothes at the terminal company's locker room on the west side of the tracks, the decedent was driving his car easterly on Church Street to begin his job on the east side of the crossing. As he was crossing the tracks, his car was hit by the section of railroad cars and diesels which were being backed in a northerly direction on the appellee's tracks. Testimony as to the speed at which the train was traveling varied from an estimate of 15-18 miles per hour to 30-35 miles per hour. After the decedent's car was struck by the train, it was pushed a distance of 257 feet down the track.

The second amended complaint was in two counts. Count I alleged negligence on the part of appellee by failing to provide a safe place to work and by negligent operation of the train. Count II alleged violation of the Safety Appliance Act, supra, in that the train's air brake system failed to operate adequately and efficiently. In this appeal we are only concerned with matters arising out of the count based on the Safety Appliance Act since the order granting the defendant a new trial was based on the lower court's conclusion that "• • • there was no evidence upon which the jury could lawfully have found that the defendant violated the Safety Appliance Act (45 U.S.C.A., Sec. 9 et seq.) as charged in Count II of the Amended Complaint and that the Court erred in submitting that issue to the jury for

determination." The new trial order was also based on additional grounds which we will later discuss herein. The trial court's ruling that Count II should not have gone to the jury was tantamount to judgment notwithstanding the verdict as to Count II. After holding that there was no evidence to support Count II, the trial court stated:

> "Since Count II of the amended complaint afforded a completely different basis for recovery than Count I, it is the further opinion of this Court that a new trial on the issues of negligence and damages must be granted."

After so stating in the new trial order, the trial court proceeded to grant defendant's motion on grounds 1, 2, 3, 4, and 22 of defendant's motion for new trial. An examination of defendant's motion for new trial reflects numerous grounds advanced, but for the purposes of our consideration of this appeal we need discuss only two of the grounds forming the basis of the trial court's order, viz:

> "1. That the verdict herein is contrary to the evidence.
>
> • • • • •
>
> "4. That there is no evidence upon which the jury could have properly found that defendant violated the Safety Appliance Act (45 U.S.C., Section 9) and this cause was accordingly improperly submitted to the jury for determination thereof."

Appellant's brief is directed largely at ground No. 4 relating to the issue of evidence to support a jury instruction on the Safety Appliance Act violation alleged in Count II of the complaint. By its order, the trial court found there was no evidence to support that count and ordered a new trial on the issue of negligence embodied in

the first count. We are of the view, and so hold, that the lower court erred in holding there was no evidence to support the claimed violation of the Safety Appliance Act.

Plaintiff-Appellant's theory of liability under Count I was based on a number of alleged acts of negligence including the furnishing of a dangerous and unsafe place to work, failure to provide a barrier for vehicular traffic such as a lowered gate in circumstances where flashing lights and ringing bells were alleged to be insufficient protective devices, as well as other acts of negligence. Additionally, it was alleged that the defendant was negligent in that the cut of cars which struck the decedent was operated in a reverse movement at a speed that was excessive under the circumstances.

Plaintiff's theory of liability under Count II was that the brakes on the train were inefficient on the occasion of this incident and that such inefficiency constituted a violation of the Safety Appliance Act.

There was direct evidence of excessive speed. This is conceded by the defendant. The only evidence of inefficient brakes, however, was circumstantial and consisted of testimony given by members of the train crew on cross examination that the train was traveling at the speed of 15-18 miles per hour. Further, there was testimony that at a speed of 15-18 miles per hour, the distance that it took to stop the train showed that the brakes did not operate efficiently. The latter conclusion being justified by the evidence introduced that the train did not come to a stop until it had reached some 257 feet from the point of impact. Witnesses testified that efficient brakes applied at the speed of 15-18 miles per hour would have stopped the train within 35 to 40 feet or 40 to 50 feet. These stopping distances were within the range of testimony as to the distance from the crossing that the brakes were applied.

We think the evidence related above meets the standard of proof set by the federal courts in cases under the Safety Appliance Act. Those decisions govern the question of the sufficiency of the evidence and the type of proof necessary to make out a case under the appliance act. Atlantic Coast Line Railroad Co. v. Barrett, 101 So.2d 37 (Fla. 1958). In Myers v. Reading Company, 331 U.S. 477, 67 S. Ct. 1334, 91 L.Ed. 1615, the Supreme Court held that a violation of the subject act is established if the proofs show that the brakes did not operate efficiently on a single occasion and that such proof is not detracted from by other proof that they worked efficiently both before and after the occasion in question.

Evidence that a train would have stopped in a certain distance at a given speed had the brakes been efficient has been held competent proof of the efficiency of brakes for the purpose of an action brought under the Safety Appliance Act. Noe v. Chicago Great Western Railway Company, 71 Ill. App.2d 347, 219 N.E.2d 111 (1965). It is evidence of this kind that the trial court erroneously held was insufficient to prove Count II in the instant case. We think the issue was correctly submitted to the jury on this evidence.

The order under review was based on grounds for a new trial other than the one that is discussed above. The trial court also held that the verdict of the jury was contrary to the evidence and in so holding came within the principles laid out in Cloud v. Fallis, 110 So.2d 669 (Fla. 1959). There the court held that the trial judge has broad discretion in granting a new trial if he finds that the jury was influenced by consideration outside the record as he appears to have in the case at bar. Farrior v. Prudence Mutual Casualty Company, 220 So.2d 386 (Fla. App. 1969).

Accordingly, we reverse the order granting a new trial insofar as the same holds that there was no evidence placed before the jury to justify an instruction on the claimed violation of the Safety Appliance Act and affirm the order granting a new trial on the other ground stated in the order to the effect that the verdict is contrary to the evidence on the authority of Cloud v. Fallis, supra. See Hendricks v. Dailey, 208 So.2d 101 (Fla. 1968).

Affirmed in part and reversed in part.

RAWLS, *Acting C. J.*, and JOHNSON, *J.*, concur.

APPENDIX E

Opinion of Supreme Court of Florida in Connection with the Appeal by Plaintiff in Mrs. Hodge's Suit Under the FELA—April 22, 1970

SUPREME COURT OF FLORIDA

April 22, 1970

Rehearing Denied May 27, 1970

No. 38810

IRIS HODGE, as Administratrix of the Estate of James L. Hodge, deceased,

Petitioner,

—v.—

JACKSONVILLE TERMINAL COMPANY, a corporation,

Respondent.

DREW, *Justice.*

In its decision[1] the District Court of Appeal reversed the order of the trial court "insofar as the same holds that there was no evidence placed before the jury to justify an instruction on the claimed violation of the Safety Appliance Act" but "affirm[ed] the order granting a new trial on the other ground stated in the order to the effect that the verdict is contrary to the evidence on the authority of Cloud v. Fallis, supra [110 S. 2d 669]." Petitioners here assert that the sole question presented to and argued on

[1] Hodge v. Jacksonville Terminal Company, 222 So.2d 483 (1st Dist. Ct. App. Fla. 1969).

the appeal of the order granting a new trial to the District Court of Appeal was "*whether the evidence created a jury question as to the railroads violation of the Safety Appliance Act so that the jury was properly instructed on that issue,*" and, therefore, that such decision is in direct conflict with Nunberg v. Brodsky,[2] holding in part:

> "The second ground of the order, that the verdict was not 'consistent' with the evidence, was insufficient upon which to grant a new trial. The trial court did not find or conclude that the verdicts were against the manifest weight of the evidence, for which, had he so concluded, a new trial properly could have been granted, as held in Cloud v. Fallis, Fla. 1959, 110 So.2d 669, 673. See also Florida East Coast R. Co. v. Hayes, 66 Fla. 589, 64 So. 274, 276; Burnett v. Soule, 78 Fla. 507, 83 So. 461, 462; Greiper v. Coburn, 139 Fla. 293, 190 So. 902, 904; Hart v. Held, 149 Fla. 33, 5 So.2d 878, 882; Grand Assembly, etc. v. New Amsterdam Casualty Co., Fla. App. 1958, 102 So.2d 842, 846. Those cases reiterate the rule that where the evidence on the issues made is in conflict, and the verdict found thereon is not manifestly against the weight of the evidence, the court will not interfere and set aside the verdict of the jury."

The district court's conclusion that the trial judge did not err in granting a new trial "if he finds that the jury was influenced by consideration outside the record as he *appears* to have in the case at bar" is obviously erroneous because the trial judge made no such finding in the order. On the contrary, the order specifically stated:

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[2] 224 So.2d 727, 729 (3rd Dist. Ct. App. Fla. 1969).

"* * * the Court has reached the conclusion that there was no evidence upon which the jury could lawfully have found that the defendant violated the Safety Appliance Act (45 U.S.C., Sec. 9 et seq.) as charged in Count II of the Amended Complaint and that the Court erred in submitting that issue to the jury for determination. * * *"

The order then adjudged:[3]

"1. Defendant's Motion for New Trial should be and it, hereby, is granted on grounds 1, 2, 3, 4 and 22 of said

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[3] The grounds #1, 2, 3, 4 and 22 of the Motion for New Trial were:

"1. That the verdict herein is contrary to the evidence.

"2. That the verdict herein is contrary to law.

"3. That the verdict herein is contrary to the law and to the evidence.

"4. That there is no evidence upon which the jury could have properly found that defendant violated the Safety Appliance Act (45 U.S.C., Section 9) and this cause was accordingly improperly submitted to the jury for determination thereof.

* * * * *

"22. By the giving of the last paragraph of plaintiff's requested instruction No. 9, with the fourth paragraph of plaintiff's requested instruction No. 1, and the giving of defendant's requested instruction No. 2 *in part only*, the Court erroneously TOLD the jury that plaintiff charges:

'* * * that such movement did not have the *breaking power* specified by Federal law * * * the burden of proof is upon the plaintiff to prove * * * that the defendant violated the provisions of the Act as charged * * *' and that the Federal law makes '* * * the defendant employer responsible in damages * * * if the braking system * * * was not *effectively working* * * * and if said *inefficiency* in whole or in part produced the death of the employee.'; and then again, 'As to the statute concerning *efficient* train brakes * * * the plaintiff is entitled to recover full damages if this allegation is proved * * * regardless of the employee's actions.'

"thus permitting the jury to award full damages if they found that the train brakes were 'not effectively working or were inefficient, contrary to the requirements of law.'"

Motion and the verdict and judgment rendered in the above entitled cause, including this Court's Order taxing costs filed herein September 18, 1967, are set aside. In all other respects said Motion is denied."

We construe the order of the trial judge referring to ground no. 1 in the Motion for New Trial to have reference solely to facts concerning the submission to the jury of the Safety Appliance Act aspect of the case which was his principal concern—and obviously the concern of the parties on appeal to the district court. Setting aside a jury verdict on this ground requires more than a cursory disposition of a ground of a Motion for New Trial that "the verdict is contrary to the evidence." There should be an independent determination by the trial judge that "the jury was influenced by considerations outside the record." We find no determination in this record to support the district court's conclusion in this respect. On the contrary, ground 13 of the Motion for New Trial specifically charged that "the jury was motivated by passion, prejudice, bias or some other improper motive and/or that the passions of the jury were inflamed by circumstances outside of the evidence in the case. * * *" This paragraph was denied in the order of the trial judge.

The reliance by the district court on our decision in Cloud v. Fallis[4] to support its decision affirming the order granting the new trial because the verdict was "contrary to the evidence" is misplaced. The motion for new trial did not allege and the trial judge did not find that the verdict was against "the manifest weight of the evidence" which is the rule announced in Cloud v. Fallis, *supra*.[5]

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[4] 110 So.2d 669 (Fla. 1959).

[5] "In an attempt to dispel this confusion about procedure of such importance, we will undertake to restate the law on the subject.

That portion of the decision of the district court which affirms the order granting a new trial is hereby quashed and the cause is remanded to the district court with directions to remand to the trial court with instructions to enter an appropriate judgment on the jury verdict.

It is so ordered.

Ervin, *C.J.*, Thornal, Carlton, Adkins and Boyd, *JJ.*, concur.

Roberts, *J.*, dissents.

"When a motion for new trial is made it is directed to the sound, broad discretion of the trial judge, Poindexter v. Seaboard Air Line R. Co., Fla., 56 So.2d 905; Mead v. Bentley, Fla., 61 So.2d 428, who because of his contact with the trial and his observation of the behavior of those upon whose testimony the finding of fact must be based is better positioned than any other one person fully to comprehend the processes by which the ultimate decision of the triers of fact, the jurors, is reached, Pyms v. Meranda, Fla., 98 So.2d 341.

"When the judge, who must be presumed to have drawn on his talents, his knowledge and his experience to keep the search for the truth in a proper channel, concludes that the verdict is against the manifest weight of the evidence, it is his duty to grant a new trial, and he should always do that if the jury has been deceived as to the force and credibility of the evidence or has been influenced by considerations outside the record. Martin v. Stone, supra [Fla., 51 So.2d 33]; Turner v. Frey, supra [Fla., 81 So.2d 721, 722]; Myers v. Atlantic Coast Line Railroad Co., Fla., 86 So.2d 792; Florida Publishing Co. v. Copeland, Fla., 89 So.2d 18.

"Inasmuch as such motions are granted in the exercise of a sound, broad discretion the ruling should not be disturbed in the absence of a clear showing that it has been abused. Dent v. Margaret Ann Super Markets, Fla., 52 So.2d 130; Geffrey v. Langston Const. Co., Fla., 58 So.2d 698; Pyms v. Meranda, supra." Cloud v. Fallis, 110 So.2d 669, 673 (Fla. 1959).

See also Bennett v. Jacksonville Expressway Authority, 131 So.2d 740 (Fla. 1961); Nunberg v. Brodsky, supra; Hendricks v. Dailey, 208 So.2d 101 (Fla. 1968).

APPENDIX F

Statutory and Constitutional Provisions

A. Sections 768.05 and 768.06 of the Florida Statutes, dealing with railroad liability, read as follows:

768.05 Liability of railroad company.—A railroad company shall be liable for any damage done to persons, stock or other property, by the running of the locomotives, cars, or other machinery of such company, or for [redacted] done by any person in the employ and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company.

768.06 Comparative negligence.—No person shall recover damages from a railroad company for injury to himself or his property, where the same is done by his consent, or is caused by his own negligence. If the plaintiff and the agents of the company are both at fault, the former may recover, but the amount of recovery shall be such a proportion of the entire damages sustained, as the defendant's negligence bears to the combined negligence of both the plaintiff and the defendant.

B. The Florida Wrongful Death Act, in pertinent part, Sections 768.01 and 768.02, Florida Statutes, reads as follows:

768.01 Right of action for death.—

(1) Whenever the death of any person in this state shall be caused by the wrongful act, negligence, carelessness or default of any individual or individuals, or by the wrongful

act, negligence, carelessness or default of any corporation, or by the wrongful act, negligence, carelessness, or default, of any agent of any corporation, acting in his capacity of agent of such corporation (or by the wrongful act, negligence, carelessness or default of any ship, vessel or boat or persons employed thereon), and the act, negligence, carelessness or default, is such as would, if the death had not ensued, have entitled the party injured thereby to maintain an action (or to proceed in rem against the said ship, vessel or boat, or in personam against the owners thereof, or those having control of her) and to recover damages in respect thereof, then and in every such case the person or persons who, or the corporation (or the ship, vessel or boat), which would have been liable in damages if death had not ensued shall be liable to an action for damages (or if a ship, vessel or boat, to a libel in rem, and her owners or those responsible for her wrongful act, negligence, carelessness or default, to a libel in personam), notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony.

(2) The right of action as set forth in subsection (1) above shall extend to and include actions ex contractu and ex delicto.

768.02 Parties; damages; proviso.—Every such action shall be brought by and in the name of the widow or husband, as the case may be, and where there is neither widow nor husband surviving the deceased, then the minor child or children may maintain an action; and where there is neither widow nor husband, nor minor child or children, then the action may be maintained by any person or persons dependent on such person killed for a support; and

where there is neither of the above classes of persons to sue, then the action may be maintained by the executor or administrator, as the case may be, of the person killed. In case of the death of any person solely entitled, or of all the persons jointly entitled to sue, before action brought or before the recovery of a final judgment in action brought by him or them, the right of action or the action as the case may be, shall survive to the person or persons next entitled to sue under this section, and in case of the death of one or more persons jointly entitled to sue before action brought or before the recovery of a final judgment in an action brought by them, the right of action or the action, as the case may be, shall survive to the survivor of such persons so jointly entitled to sue; and in every such action the jury shall give such damages as the party or parties entitled to sue may have sustained by reason of the death of the party killed; provided, that any person or persons to whom a right of action may survive under the provisions of this act shall recover such damages as by law such person or persons are entitled in their own right to recover, irrespective of the damages recoverable by the person or persons whom he or they may succeed.

C. Section 4(2) of Article 5 of the Florida Constitution reads as follows in pertinent part:

§4. SUPREME COURT

• • • • •

(2) *Jurisdiction.* • • •

Appeals from district courts of appeal may be taken to the supreme court, as a matter of right, only from decisions initially passing upon the validity of a state statute or a federal statute or treaty, or initially construing a controlling provision of the Florida or federal constitution.

The supreme court may review by certiorari any decision of a district court of appeal that affects a class of constitutional or state officers, or that passes upon a question certified by the district court of appeal to be of great public interest, or that is in direct conflict with a decision of another district court of appeal or of the supreme court on the same point of law, and may issue writs of certiorari to commissions established by law.

D. Sections 1, 3, 4, and 9 of the Federal Employers' Liability Act ("FELA"), 35 Stat. 65, as amended, 45 U.S.C. §§51, 53, 54 and 59, read as follows:

§1. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees.

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this Act (Apr. 22, 1908, ch. 149, §1, 35 Stat. 65; Aug. 11, 1939, ch. 685, §1, 53 Stat. 1404.)

• • • • •

§3. Contributory negligence; diminution of damages.

In all actions on and after April 22, 1908 brought against any such common carrier by railroad under or by virtue of any of the provisions of this Act to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided,* That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. (Apr. 22, 1908, ch. 149, §3, 35 Stat. 66.)

§4. Assumption of risks of employment.

In any action brought against any common carrier under or by virtue of any of the provisions of this Act to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from

the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. (Apr. 22, 1908, ch. 149, §4, 35 Stat. 66; Aug. 11, 1939, ch. 685, §1, 53 Stat. 1404.)

• • • • •

§9. Survival of right of action of person injured.

Any right of action given by this Act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury. (Apr. 22, 1908, ch. 149, §9, as added Apr. 5, 1910, ch. 143, §2, 36 Stat. 291.)

E. Sections 1 and 9 of the Safety Appliance Act, 27 Stat. 531, 45 U.S.C. §§1 and 9, read as follows:

§1. Driving-wheel brakes and appliances for operating train-brake system.

It shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system, or to run any train in such traffic that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose. (Mar. 2, 1893, ch. 196, §1, 27 Stat. 531.)

• • • • •

§9. Power or train brakes; operation by engineer; rules for installation, inspection, maintenance, and repair.

Whenever, as provided in sections 1 to 7 of this Act, any train is operated with power or train brakes not less than 50 per centum of the cars in such train shall have their brakes used and operated by the engineer of the locomotive drawing such train; and all power-braked cars in such train which are associated together with said 50 per centum shall have their brakes so used and operated; and, to more fully carry into effect the objects of said sections, the Secretary of Transportation may, from time to time, after full hearing, increase the minimum percentage of cars in any train required to be operated with power or train brakes which must have their brakes used and operated as aforesaid. The rules, standards, and instructions of the Association of American Railroads, adopted in 1925 and revised in 1933, 1934, 1941, and 1953, with such revisions as may have been adopted prior to the date of enactment of the Power or Train Brakes Safety Appliance Act of 1958, for the installation, inspection, maintenance, and repair of all power or train brakes for common carriers engaged in interstate commerce by railroad shall remain the rules, standards, and instructions for the installation, inspection, maintenance, and repair of all power or train brakes unless changed, after hearing, by order of the Secretary of Transportation: *Provided, however,* That such rules or standards or instructions or changes therein shall be promulgated solely for the purpose of achieving safety. The provisions and requirements of this section shall apply to all trains, locomotives, tenders, cars, and similar vehicles used, hauled, or permitted to be used or hauled, by any railroad engaged in interstate commerce. In the execution of this section, the Secretary of Transportation may utilize the

services of the Association of American Railroads, and may avail himself of the advice and assistance of any department, commission, or board of the United States Government, and of State governments, but no official or employee of the United States shall receive any additional compensation for such service except as now permitted by law. Failure to comply with any rule, regulation, or requirement promulgated by the Secretary of Transportation pursuant to the provisions of this section shall be subject to the like penalty as failure to comply with any requirement of this section. (Mar. 2, 1903, ch. 976, §2, 32 Stat. 943; Apr. 11, 1958, Pub. L. 85-375, 72 Stat. 86.)

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-173

JACKSONVILLE TERMINAL COMPANY,
a Corporation,
Petitioner,

vs.

IRIS HODGE, As Administratrix of the Estate of
James L. Hodge, Deceased,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

The petitioner, Jacksonville Terminal Company, seeks review by petition for writ of certiorari, pursuant to 28 U.S.C., § 1257(3) of the decision of the First District Court of Appeal of Florida in *Jacksonville Terminal Co. v. Hodge*, Fla. App. 1972, 260 So. 2d 521. The decision, in which no certiorari review was sought to the Florida Supreme Court as permitted by Art. V, § 4(2), Florida Constitution, affirmed a jury verdict and judgment recovered by the plaintiff, the representative of the estate of James L. Hodge, deceased, in a wrongful death action under the provisions of the Federal Employers' Liability Act, 45 U.S.C.A., § 51. The action was based upon alternative con-

tentions that Hodge's death had been caused, in whole or in part, by his employer, the terminal company's negligence, under 45 U.S.C., § 51; and by its violation of the "train brake" provision of the Safety Appliance Act, 45 U.S.C., § 9.[1] Among other things, the decision sought to be reviewed

(a) Affirmed a determination by the trial judge that, as a matter of law, Hodge had been killed while in the course of his employment with the defendant railroad, and thus that an action for his wrongful death could be maintained only under the F.E.L.A., see *Mondou* v. *New York, N.H. & H. R. Co.*, 223 U.S. 1 (1908); *New York Central R. Co.* v. *Winfield*, 244 U.S. 147 (1917); and

(b) That the F.E.L.A. action for the benefit of Hodge's widow and his three minor children was not precluded by the fact that Mrs. Hodge, acting individually and as widow for her own benefit alone, had maintained and lost an action assumedly under the Florida wrongful death statute for the death of her husband allegedly "proximately" caused by common law negligence of the railroad—an action in which the Safety Appliance Act question was not at all involved and in which the status of Hodge as an employee at the time of the accident and thus the applicability of the F.E.L.A. as the exclusive remedy for his death had never been raised by either party or adjudicated in any way.

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1. In prior decisions involving this case, the Florida Appellate Courts have upheld the sufficiency of the evidence to support the jury instruction, and thus a jury finding of liability against the railroad—without deduction for contributory negligence, 45 U.S.C., § 53—on the Safety Appliance Act issue. *Hodge* v. *Jacksonville Terminal Co.*, Fla. App. 1969, 222 So. 2d 483, cert. granted and decision quashed in part, Fla. 1970, 234 So. 2d 645, cert. den., 400 U.S. 904 (1970).

In this proceeding, the railroad-petitioner does not challenge the former ruling; it seeks certiorari solely on the basis of the latter one.

The case arose on the Sunday evening of September 30, 1962, when James L. "Bill" Hodge, a switchman-conductor employed by the Jacksonville Terminal Company, was killed at his employer's Church Street grade crossing in Jacksonville, Florida. Shortly before the accident occurred, Hodge had changed into his working clothes and picked up his switchman's lantern at the locker room provided by the terminal company for its employees on the west side of the 13-track crossing. Hodge was driving his car east on Church Street to begin his work at the "express shed" or yard office which was located to the east of the tracks adjacent to a parking lot provided for the use of those employees who work there. Unfortunately Hodge did not make it across the tracks. His automobile was struck by a "cut" of seven cars and three diesel engines being backed in a northerly direction by a Jacksonville Terminal Company crew and he was, apparently instantly, killed.

Affirmatively alleging that at the time of his death Hodge had been employed by Jacksonville Terminal in furtherance of interstate commerce so as to invoke the application of the Federal Employer's Liability Act, 45 U.S.C.A., § 51, his widow, Iris Hodge, as the duly appointed Administratrix of his estate, brought this two-count action in the Duval County, Florida Circuit Court against the terminal company to recover the damages provided by the F.E.L.A. for the benefit of herself as widow and of Hodge's three minor children, Richard, James and Jill, who were nine, five and three years of age respectively at the time of his death. The railroad's answer claimed that Hodge was not acting within the course of his employment with the railroad at the time of his death; and,

apparently alternatively, that the F.E.L.A.-Safety Appliance Act action was barred by the doctrines of "res judicata," and/or "estoppel by judgment" or "collateral estoppel" by virtue of the jury verdict and judgment in favor of the railroad in an action arising out of Hodge's death, which were affirmed in *Hodge* v. *Jacksonville Terminal Co.*, Fla. App. 1965, 170 So. 2d 481, cert. den., Fla. 1965, 177 So. 2d 475. That case had been mistakenly brought, and was mistakenly maintained throughout without comment or contention by either party or adjudication by any court on the issue, as if it were one under the Florida wrongful death statute and the Florida common law for the death of an "ordinary" motorist in an "ordinary" railroad crossing accident. In that case, as provided by the Florida wrongful death statute, F.S. § 768.01, et seq., Mrs. Hodge sued individually to recover damages in her own behalf and in her own right as Hodge's widow. While, under the Act, such a widow may recover, as an element of the damages to which she is individually entitled, for the loss of her husband's services to and support of their minor children, any recovery—as the court below specifically held in its decision in this case, at 260 So. 2d 523—inures solely to her benefit, and she need not share any recovery, including one for this element of damage, with the children. In contrast, of course, an F.E.L.A. action—such as this one—is maintained specifically for the use and benefit of the children themselves (as well as the widow) and their individual recovery inure directly to their individual benefits. The earlier common law action by Mrs. Hodge did not involve at all a contention that the railroad had been guilty of a Safety Appliance Act violation; the prior trial did not concern the issue, and the prior judgment, of course, did not reflect any determination of it. On the common law negligence question, which was the sole issue tried in the "first" case, Mrs. Hodge

(a) Was required to show that the railroad had been guilty of negligence, defined in common law terms, which was a "proximate cause" of the accident, see *Atlantic Coast Line R. Co.* v. *Price*, Fla. 1950, 46 So. 2d 48;[2]

(b) Was bound by civil Florida common law rules that grant railroad trains a preemptive "right-of-way" over travelers at the crossing, *Roberts* v. *Powell*, 137 Fla. 159, 187 So. 766;

(c) Could not base a claim of negligence upon the railroad's failure to provide a particular protective device at the crossing in question, beyond the "crossbuck" statutorily required. See *Atlantic Coast Line R. Co.* v. *Wallace*, 61 Fla. 93, 54 So. 893. Thus, she could not assert that the railroad had been guilty of negligence in not providing a crossing gate at Church Street, although such a device was required in the exercise of reasonable care. Contrast, e.g., *Woodington* v. *Pennsylvania R. Co.*, 2 Cir. 1956, 236 F. 2d 760, 764-765;

(d) Was thus confined to an attempt to demonstrate that the railroad had been guilty of negligence in excessive speed or failure to give adequate warning signals from the train as it approached the cross-

2. The railroad "presumption" statute, F.S. § 768.05, to which the petitioner refers (and which, along with the comparative negligence statute, F.S. § 768.06, has since been held unconstitutional by the Florida Supreme Court, *Florida East Coast R. Co.* v. *Edwards*, Fla. 1967, 197 So. 2d 293; *Georgia S. & F. R. Co.* v. *Seven-Up Bottling Co.*, Fla. 1965, 175 So. 2d 39) was of purely procedural significance. The "presumption" dropped out of the case upon the introduction of any evidence on the subject of negligence and had no practical effect whatever upon the trial of a Florida common law railroad case or the substantive burdens borne by the plaintiff in such an action. See *Atlantic Coast Line R. Co.* v. *Webb*, 112 Fla. 449, 150 So. 741.

ing. As to the latter issue, as the first appellate decision reflects, *Hodge* v. *Jacksonville Terminal Co.*, at 170 So. 2d 483-484, the plaintiff was bound by a severely restrictive state evidentiary rule and jury instruction to the effect that "negative" testimony that such signals were not given could not overcome "positive" testimony from the train crew that they were.

Thus, the prior jury verdict against Mrs. Hodge, individually, on the one hand, see *Baltimore S.S. Co.* v. *Phillips*, 274 U.S. 316, 323 (1927), was based upon an action which severely confined the possible bases of recovery, as contrasted with those of the F.E.L.A.-S.A.A.; and, on the other hand, for "collateral estoppel" purposes did not represent an adjudication of any of the factual bases of the estate's recovery against the railroad in the latter action—the Safety Appliance Act violation, and the alternative contention that the railroad, in a variety of respects, had been guilty of negligence under the F.E.L.A., which played a part, "even the slightest," in causing, in whole or in part, Hodge's death.[3]

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3. The Florida state remedy vastly differed from that afforded by the F.E.L.A. for still another, decisive reason. Although the plaintiff would have been *able* to claim a Safety Appliance Act violation in the Florida wrongful death action, see *Caudell* v. *Florida East Coast R. Co.*, Fla. App. 1966, 201 So. 2d 583, that action would have been subject to the then-applicable state defense of "comparative negligence" on the part of Hodge, *Crane* v. *Cedar Rapids & I. C. R. Co.*, 395 U.S. 164 (1969); under the F.E.L.A., of course, as held in this case, neither comparative nor contributory negligence constitutes any defense whatever, 45 U.S.C., § 53. Moreover, a comparison of the facts and holding in *Caudell*, supra, involving a Florida "common law" Safety Appliance Act action with those in the prior decision in this case, *Hodge* v. *Jacksonville Terminal Co.*, Fla. App. 1969, 222 So. 2d 483, demonstrates that, if Florida rather than F.E.L.A. law were involved, the Florida courts might well have held that the evidence was insufficient in this case to make out a jury question on the Safety Appliance Act issue.

The trial judge consistently rejected the railroad's defenses involving the prior action. At the trial, he determined, as we have noted, that the F.E.L.A. properly applied to Hodge's death as a matter of law, and did not submit that issue to the jury. As to liability, he submitted both the negligence-comparative negligence issue involved in Count I,[4] and the "brake efficiency" issue involved in Count II to the jury. The railroad objected to the use of special interrogatories proposed by the plaintiff which would have determined the count upon which the jury reached its eventual verdict for the plaintiff. Because of this objection, the verdict returned by the jury was a *general* one in favor of the plaintiff which awarded a total of $195,200 to Mr. Hodge's estate, with allocations of $133,200 for the benefit of Mrs. Hodge, $16,000 to the older son, Ricky, $21,000 to the younger son and $25,000 to Jill.[5] [6]

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4. These claims involved, among other things, the contentions that the railroad was negligent in failing to provide an automatic crossing gate; and that it had not given proper whistle or bell warning of the train's approach.

5. In its appeal to the First District Court of Appeal, the railroad, at page 47 of its brief, claimed that this amount included no deduction whatever for any negligence of Mr. Hodge which was said to have existed in at least some amount as a matter of law. At page 7, n. 6 of the brief of appellee, the plaintiff accepted this contention, which amounted to the conclusion that the verdict was necessarily based upon the Safety Appliance Act violation as to which there is no deduction for contributory negligence—regardless of its existence. Hence, the posture of the case in the Court of Appeal was that the sole basis of the jury verdict was the Safety Appliance Act violation, as to which there was no issue made whatever in the "first" case.

6. At page 12 of the petition, the railroad makes some claim that, even if the children are entitled to their verdicts and are not barred by a prior proceeding in which they were not parties in any respect, Mrs. Hodge may not recover the amount allocated to her. This claim may not, it is submitted, even be considered by this Court since it comes for the first time in this proceeding; the railroad throughout its pleadings and appellate briefs, claims only that the entire action was barred by the first case and that it was entitled to a judgment in its favor in the entire action. See *Street* v. *New York*, 394 U.S. 576, 581-582 (1969).

After the return of the verdict the railroad filed motions for judgment in its favor notwithstanding the verdict and for a new trial, based upon numerous grounds. The trial judge denied the motion for judgment, but granted the motion for new trial upon the single ground that he had improperly instructed the jury on the Safety Appliance Act issue, since, his order stated, "there is no evidence upon which the jury could have properly found that defendant violated [the statute] . . ." The plaintiff then appealed to the First District Court of Appeal from that order. In *Hodge* v. *Jacksonville Terminal Co.*, Fla. App. 1969, 222 So. 2d 483, the District Court rejected the conclusion that the evidence did not sustain an instruction under the S.A.A. but affirmed the order granting a new trial upon another ground. As provided by Art. V, § 4(2), Florida Constitution, the plaintiff then applied to the Supreme Court of Florida for a writ of certiorari to review the latter conclusion, on the ground that the District Court also was in "direct conflict with a decision of another District Court of Appeal [and] of the Supreme Court on the same point of law. . ." The Supreme Court of Florida granted the petition, and on the merits, quashed the affirmance of the new trial order in *Hodge* v. *Jacksonville Terminal Co.*, Fla. 1970, 234 So. 2d 645, cert. den., 400 U.S. 904 (1970). When, pursuant to the Supreme Court of Florida order, the trial judge reinstated the prior judgment for the plaintiff, the petitioner then took the appeal which is the subject of this proceeding, again to the First District Court of Appeal.[7] The petitioner raised five separate points in the

7. Under Florida appellate practice involving appeals from orders granting new trials, the only matters reviewable on the merits in the prior appeal concerned the grounds specified for the granting of the new trial motion. It was not until the remand and the reinstatement of the judgment for the plaintiff that the railroad could raise its multiplicity of appellate objections as to the rulings *against* it.

District Court of Appeal upon which it based its claims for a judgment in its favor or for a new trial. The points are stated at 260 So. 2d 522:

1. The railroad primarily claimed that the effect of Mrs. Hodge's having *brought* the first action barred the estate's right to any recovery in this one. In presenting its argument on this issue, the brief of appellant in the District Court

(a) Specifically conceded that one of the doctrines now relied upon—res judicata—was inapplicable;

(b) Referred only fleetingly to the other doctrine referred to here—collateral estoppel—and

(c) Relied entirely as "determinative," upon a contention which is not made before this Court at all. At pages 14-16 of the brief of appellant, the railroad made the following statements:

"*By applying the above principles we readily conclude that the defense of res adjudicata* (*defendant's sixth defense*) *is not here sufficient* because the first and second Hodge cases each involve different causes of action:[8] The first suit was brought under the Florida wrongful death statute; the second, under FELA. Although many of the elements of Estoppel by Judgment (defendant's fifth defense) are present, this defense presents

8. Although, as the opinion below at 260 So. 2d 523, n. 7, reflects, the railroad attempted to change its position initially in its reply brief, the District Court held that this could not be done and, for obvious valid state procedural reasons, did not pass upon the belatedly asserted claim of res judicata at all. Since this is the case, as we shall emphasize, it is plain that the "merits" of the res judicata claim cannot be properly presented for the first time to this Court. See *Street* v. *New York*, supra.

> some difficulty in that it impliedly recognizes the co-existence of two valid causes of action. As previously noted, this is not the situation in the instant case. The plaintiff here had only one cause of action (FELA or F.S. 768.01) depending upon the 'employment status' of her husband at the time of his death. This leads us to the defendant's third defense which, defendant submits, is determinative of the issues of this cause. This defense is a 'form' of estoppel by judgment. Its essence is that the plaintiff, having assumed and prosecuted to ultimate conclusion the first cause of action under F.S. 768.01 upon the necessary factual premise that her husband at the time of his death was not employed by defendant in furtherance of interstate commerce, is now estopped to assert a different and inconsistent state of facts in order to create a new cause of action under FELA, arising out of the same accident."

2. The railroad also contended that the trial judge's determination that the F.E.L.A. applied as a matter of law was incorrect; and that he had erred in charging the jury that the doctrine of assumption of the risk did not apply to the action. 45 U.S.C., § 54.

In the decision now sought to be reviewed, the District Court of Appeal reviewed each of the defendant's contentions. It held:

> That the doctrine of "collateral estoppel"—the only defense it discussed on the point—[9] did not apply to preclude the estate's recovery under the F.E.L.A.-S.A.A. As to *this issue* it rested its decision upon

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9. Ibid.

the fact that the "parties" in the two cases were not the same; that is that "Florida law makes a substantive distinction. . ." between the widow's right to recovery under the Florida wrongful death act, in which the recovery "inures solely to the benefit of the widow" and an administrator's action under the F.E.L.A. in which "the estate must maintain the action for the use and benefit of the widow and the minor children. . ." Under these circumstances, the Court held that the decision of this Court in *Troxell* v. *Delaware L. & W. R. Co.*, 227 U.S. 434 (1913), in which the same situation was involved, applied; and that the later decision in *Chicago R. I. & P.R. Co.* v. *Schendel*, 270 U.S. 611 (1926), in which the sole beneficiary of the F.E.L.A. administrator's action was the widow who had been a party to an earlier proceeding, and in which there were no children or other beneficiaries involved, did not apply. The District Court did not discuss any of the numerous other reasons for the inapplicability of the collateral estoppel doctrine to the facts of this situation.

The District Court also upheld the determination as to the applicability of the federal remedy as a matter of law; and rejected the claim that the "no assumption of risk charge" had been error. The other contentions of the railroad as to evidentiary error and "gross excessiveness" were likewise held to have been without merit.

Although the defendant petitioned for rehearing in the District Court of Appeal, it did not, upon the denial of that petition, petition the Supreme Court of Florida for a writ of certiorari to review the merits of the District Court decision. Instead, it directly filed this petition for writ of certiorari in this Court.

JURISDICTION

The petitioner invokes this Court's jurisdiction to review the First District Court of Appeal decision below on the basis, of course, of 28 U.S.C., § 1257(3). It is clear, however, that the petitioner, because of its failure to seek certiorari review in the Supreme Court of Florida, cannot, as is required, affirmatively show that the District Court decision is one rendered by the "highest court of a State in which a decision could be had. . ."; therefore, it is submitted, that this Court lacks jurisdiction to review the decision below under 28 U.S.C., § 1257.

As we have indicated, under Art. V, § 4(2) of the Florida Constitution—the provision which the respondent successfully invoked in the prior appellate proceedings—the Supreme Court of Florida may review on petition for writ of certiorari any decision of the District Court of Appeal, such as the one below—which it determines to be in "direct conflict" with a prior decision either of another District Court of Appeal or of the Supreme Court itself. E.g., *Parsons* v. *Reyes*, Fla. 1970, 238 So. 2d 561. Furthermore, when the jurisdiction of the Supreme Court of Florida is properly invoked because of the existence of a "direct conflict" with a prior decision on *any issue*, the Supreme Court of Florida has jurisdiction to decide every issue raised in the action, as if the case were on direct appeal to the Supreme Court. E.g., *Tyus* v. *Apalachicola Northern R. Co.*, Fla. 1961, 130 So. 2d 580, 585-586. Of course, the existence of such a constitutional "direct conflict" is itself the subject of argument—in the preliminary briefs on jurisdiction provided by Florida Appellate Rule 4.5c(6)—and de-

cision by the Florida Supreme Court.[10] But the fact is that, unlike virtually every Florida litigant who has filed a petition for certiorari directed to a District Court of Appeal, the petitioner in this case cannot show that the Supreme Court of Florida did not have jurisdiction in the case, because it failed to ask that Court to review it.[11] Compare, e.g., *Mellon* v. *O'Neil*, 275 U.S. 212 (1927).

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10. The respondent can suggest at least two non-frivolous bases for a claim of constitutional "direct conflict" which the petitioner could have made, but, of course, did not, in an attempt to secure Supreme Court of Florida review of the decision it now questions here:

(a) At page 13 of the petition here, the railroad itself indicates that the District Court determination of a substantive difference between a widow's recovery under the Florida wrongful death statute and the estate's claim under the F.E.L.A. is somehow contrary to the "well established law in Florida" based upon the decision of the Supreme Court of Florida in *Osborne* v. *Van Horn*, 1848, 2 Fla. 360, to the effect that a widow may "resort to the awards to the children in order to support them." If the Supreme Court of Florida agreed, it had jurisdiction to resolve the disparity in decisions. *City of Miami* v. *Jafra Steel Corp.*, Fla. 1966, 184 So. 2d 178.

(b) Throughout the appellate proceedings below, the railroad contended that the granting of the no "assumption of the risk" charge was erroneous and directly contrary to the holding of the *Third* District Court of Appeal in the F.E.L.A. case of *Price* v. *Florida East Coast R. Co.*, Fla. App. 1966, 186 So. 2d 261, where it said at 263, that ". . . it would have been improper for the Court to have injected, by instruction, the specter of assumption of the risk." Again, the petitioner might well have argued that the First District's affirmance of the trial judge's action in granting just such an instruction was in "direct conflict" with the *Price* case. Of course, it did not.

11. Thus, the case is totally unlike *Nash* v. *Florida Industrial Commission*, 389 U.S. 235 (1967), in which this Court stated at 389 U.S. 237, n. 1, that a per curiam denial of certiorari by the District Court of Appeal "apparently precludes further state review" on the ground that the Florida Supreme Court "seems to have decided that it lacks jurisdiction by appeal to consider per curiam denials of certiorari. . ." (But see *Foley* v. *Weaver Drugs, Inc.*, Fla. 1964, 177 So. 2d 221.) In the present situation, of a written opinion by the District Court of Appeal in a direct appeal, there is no question of the discretionary power of review granted to the Supreme Court of Florida when a conflict of decisions appears. See *Seaboard Airline R. Co.* v. *Branham*, Fla. 1958, 104 So. 2d 356; compare also, *Williams* v. *Florida*, 399 U.S. 78, 80, n. 5 (1970).

Under these circumstances, in which the petitioner has failed to seek possibly available review by a higher state court, this Court cannot "indulge in conjecture" as to whether the Florida Supreme Court would or would not have assumed jurisdiction over the case and passed upon its merits, see *Fisher* v. *Perkins*, 122 U.S. 522 (1887); *Stratton* v. *Stratton*, 239 U.S. 55 (1915); *Gotthilf* v. *Sills*, 375 U.S. 79 (1963). It follows that the petition does not affirmatively demonstrate, see *Fisher* v. *Perkins*, supra; *Muller* v. *Western Union Beef Co.*, 173 U.S. 116 (1899), that the District Court of Appeal is the highest court in Florida which could have decided the case in question, and the petition should be denied for that reason alone. *Dresner* v. *Tallahassee*, 378 U.S. 539 (1964).

QUESTION PRESENTED

The railroad has presented one "question" for review by this Court. In view of what the respondent has already said concerning the procedural, legal and factual bases of the case, it is obvious that it cannot accept the petitioner's statement of that question. It is believed that it may properly be rephrased as follows:

> Whether an action for the death of a railroad employee killed in the course of his employment, and properly maintained under the F.E.L.A. and Safety Appliance Act by his estate for the benefit of his widow and three minor children is precluded, as a matter of law, under the doctrine of collateral estoppel, by the fact that the employee's widow had erroneously and unsuccessfully maintained an action under a state wrongful death statute—which was jurisdictionally inapplicable to the case—solely for

her own use and benefit, and in which the liability issues upon which the estate recovered were decisively different, and in the case of the safety appliance act contention, not involved at all.

ARGUMENT

The respondent estate contends that the question presented does not justify certiorari review, on the merits, by this Court. This is so essentially because, on the virtually unique procedural and factual situation which was presented here, the result reached by the District Court—which was in essence that a jurisdictionally exclusive federal remedy could not be denied because of a mistaken and unsuccessful attempt by a railroad employee's widow to recover under inapplicable state statutory and substantive common law—for several separate reasons, was both correct, and in full accordance with the applicable decisions of this Court.

While the petitioner blithely and interchangeably argues the doctrines of "res judicata" and "collateral estoppel," it is clear that, having expressly abandoned the "res judicata" argument in the District Court of Appeal—a concession which directly resulted in the state court's failure to pass upon the sufficiency of that defense, cf., *Street* v. *New York*, supra, at 394 U.S. 582 and cases cited, because of its "want of proper presentation" there—this issue likewise may not be properly considered by this Court. Concerning the point upon which the District Court did rule and which is pressed here, "collateral estoppel," it is equally clear that the decision was, for several reasons, entirely correct:

1. It is, of course, a prerequisite for the application of the doctrine of "collateral estoppel" (as well as that of "res judicata") that the parties in the two successive actions be identical. E.g., *Troxell* v. *Delaware L. & W. R. Co.*, supra; *Gordon* v. *Gordon*, Fla. 1952, 59 So. 2d 40. Clearly, adjudications against party A cannot estop party B from securing a purportedly contrary factual determination. This rule, as the District Court properly held below, is directly applicable here. For the District Court established that, as a matter of Florida law, Mrs. Hodge, acting individually for her own benefit under the Florida wrongful death statute, is not the same "party" as Mrs. Hodge acting as the duly appointed representative of the estate of her husband for the use and benefit not only of herself, but of her three minor children as required under the F.E.L.A., 45 U.S.C., § 51.

The non-identity of the parties plaintiff involved in the two cases was established by this Court in the *Troxell* case, supra, which is virtually on all fours with this one and which—contrary to the petitioner's contentions—has specifically not been receded from in any subsequent case. In that case, as in this one, a railroad employee's widow—and in contrast to this case, joining her three children as parties plaintiff—first sued the railroad for his wrongful death purportedly under the law of Pennsylvania. After ultimately proving unsuccessful, she sought to maintain a wrongful death action as administratrix under the F.E.L.A. This Court rejected the contention that she was estopped by the prior action to do so—both holdings are applicable here:

"(a) This Court first held that the doctrine of "res judicata" could not apply because the successive

causes of action sued upon were not identical, 227 U.S. at 440-444; *this holding* was interpreted in *Baltimore S.S. Co.* v. *Phillips, supra*, as resting on the fact that the state-law remedy was markedly more restrictive than that provided under the F.E.L.A. because of the fact that an employee could not recover for the negligence of a fellow servant.

(b) The Court, in an alternative holding also held that the "parties" in the two cases were not the same. At 227 U.S. 444, the Court stated that

> ". . . there was not that identity of parties in the former action by the widow and the present case, properly brought by the administrator under the employers' liability act, which renders the former suit and judgment a bar to the present action."

In the subsequent case of *Chicago R.I. & P.R. Co.* v. *Schendel*, upon which the petitioner so heavily relies, this Court treated this second "non-identity of parties" determination in the *Troxell* case. In *Schendel*, in contrast to *Troxell* and this case, the sole "use beneficiary" of the F.E.L.A. wrongful death action was the widow herself, rather than the widow and minor children as well.[12] Under those facts, this

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12. Also in direct contrast to this case, the plaintiff widow in the prior workmen's compensation proceeding involved in the *Schendel* case had sustained a specific adverse adjudication that the state statute, rather than the F.E.L.A., applied as a factual matter to the circumstances of her husband's death. In that context alone, this Court held she was bound under collateral estoppel principles by that express adjudication. As we shall note, the law applicable to a situation like the present one, in which there has been no prior jurisdictional adjudication whatever, is entirely different and is to the effect that a prior action mistakenly maintained under a statute or in a forum which has no jurisdiction to entertain it cannot, whether successful or unsuccessful, bar a subsequent properly maintained federal cause of action.

Court specifically declined to pass upon the continued viability of the *Troxell* holding as applied to the precise party situation which existed in both *Troxell* and this case. At 270 U.S. 622-623, this Court held:

> *"Whether, . . . we now should hold that where, as in the Troxell Case, the rights of additional beneficiaries, not actual parties to the first judgment, are involved, the requirement of identity of parties is unsatisfied,* is a question we do not feel called upon here to re-examine; since we are clear that such requirement is fully met in the situation now under consideration, where the sole beneficiary was an actual party to the proceeding under the state law, and present by her statutory representatives in the action under the Federal law, and no other rights were involved." (Emphasis suppied.)

Thus, the *Troxell* holding remained entirely unaffected by *Schendel.*

The railroad argues that *Troxell* does not apply because the "parties" in the Florida wrongful death action and those in the F.E.L.A. case are really the same. It is enough to say that the District Court of Appeal has determined, as a matter of state law by which this Court is, of course, bound, e.g., *American Railway Express Co.* v. *Kentucky,* 273 U.S. 269 (1926), that there is "a substantive distinction" as to the parties in the two cases. Under Florida law, the widow would have kept all the money recovered. In the case of the F.E.L.A. action, each of Hodge's children has

an independent, protectable right to the money allocated by the jury for his damages.[13]

Since the railroad has not, until now, even suggested that the judgment against it can be divided into widow's and children's portions, and since the applicable federal and state law is that recovery by the estate for the widow and children of the decedent cannot be precluded by a prior action brought by the widow individually in which the children were not at all parties, it follows that on this narrow ground alone, the District Court decision cannot be successfully challenged.

2. There is a second, perhaps even more persuasive reason, or set of reasons, why "collateral estoppel" could not have been applied here. Collateral estoppel applies to bar re-litigation, as between the same parties, of the *same or "identical"* factual issues already litigated in a different cause of action. E.g., *United States* v. *International Building Co.*, 345 U.S. 502 (1953); cf., *Ashe* v. *Swenson*, 397 U.S. 436, 443-444 (1954); *Gordon* v. *Gordon*, supra. It goes virtually without saying that the issues in the first were not only not identical but were completely disparate:

(a) First, the Safety Appliance Act claim was not litigated at all in the first case; and there was thus no factual finding as to the railroad's violation of the Act whatever. Indeed, in the trial court, the railroad, recognizing this circumstance, did not even raise the claim of "collateral estoppel" as a defense to the estate's Safety Appliance Act claim in Count

13. The petitioner's appellate contentions that the District Court conclusion is wrong as a matter of substantive Florida law would have been better addressed, as has been suggested, to the Florida Supreme Court in a petition for "direct conflict" certiorari.

II of its complaint. Since the entire verdict and judgment was admittedly based upon the railroad's S.A.A. violation alone, it is apparent that the collateral estoppel can have not the remotest effect upon the result in this case.

(b) Even as to the negligence claim, the isssues were entirely non-identical. As we have noted, the "issue" determined by the first jury was only that the railroad was not guilty of any substantive negligence under the Florida common law which was a proximate cause of Hodge's death. As we have noted, and as the Supreme Court of Florida itself has expressly recognized, the common law of Florida and the federal law applicable under the F.E.L.A. are widely different (and vastly more favorable to the plaintiff) even as to the basic rules concerning the existence of negligence required and its causal relationship to an employee's injury or death. E.g., *Atlantic Coast Line R. Co.* v. *Barrett*, Fla. 1958, 101 So. 2d 37; *McCalley* v. *Seaboard Coast Line R. Co.*, Fla. 1972, 265 So. 2d 11. And we have already noted that the plaintiff could not even allege or prove vital types of negligent conduct under Florida law. Thus, the railroad could not show that the issues properly presented even in the F.E.L.A. negligence case had in fact been resolved in its favor in the prior action.[14]

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14. For another closely related reason which has already been indicated, the separate defense of res judicata, even if properly before either the District Court of Appeal or this one, would not be applicable. Under the *Troxell*, *Schendel* and *Phillips* cases, supra, a prior determination under state law of no employer liability cannot preclude, on res judicata principles, a subsequent federal action if the state law remedy is markedly less favorable to the employee than the federal one. As we have noted, supra, that is precisely the case in this situation in which, in many important respects, the common law rules of liability causation and applicable defenses (specifically to a Safety Appliance Act claim) are far less "liberal" than those under the F.E.L.A.

3. For still a third reason, neither the defense of collateral estoppel—nor that of res judicata—could be applicable. In this proceeding, the respondent does not challenge the finding that, as a matter of law, Hodge met his death in the furtherance of interstate commerce. Since this is true, it is entirely settled that the state court had no *jurisdiction* over the subject matter of the "first" case maintained under the Florida wrongful death act; in the case of a railroad employee injured or killed in the course of his employment, the F.E.L.A. provides the exclusive jurisdictional means in which an injury or wrongful death action may be pursued. E.g., *Mondou* v. *New York, N.H. & H. R. Co.*, supra; *New York Central R. Co.* v. *Winfield*, supra. It is apodictic, therefore, that the earlier judgment of the state court, entered absent jurisdiction over the subject matter of the proceeding cannot have either collateral estoppel or res judicata effect upon any subsequent judgment. Restatement, Judgments, § 1.

The petitioner argues, however, that, although the issue was never raised, controverted or litigated in any way in the first case, the "effect" of the judgment entered there amounted to a determination that Hodge was not an F.E.L.A. employee at the time of his death which precludes a "re-litigation" of that issue. The authorities are unanimously contrary to this proposition. The cases interpreting both the F.E.L.A. and the identical Jones Act, 45 U.S.C., § 688, have unanimously held that even the successful commencement of a proceeding—such as a workmen's compensation action—which is necessarily factually inconsistent with a later claim that the F.E.L.A. or the Jones Act is exclusively applicable, does not amount to a binding

"election," res judicata or collateral estoppel as to a subsequent action, like this one, *under* the F.E.L.A. or the Jones Act, so long as there has been no specific litigation and adjudication on the jurisdictional issue in the prior case. Contrast, *Chicago, R.I. & P.R. Co.* v. *Schendel,* supra, in which the widow suffered a specific, and therefore binding, adverse adjudication as to the applicability of the state workmen's compensation statute to her husband's death.

Thus, in the F.E.L.A. case of *Pritt* v. *West Virginia N. R. Co.,* 132 W. Va. 184, 51 S.E. 2d 105, 115-118, cert. den., 336 U.S. 961 (1943), the plaintiff had successfully litigated, even through appeal, his right to recover state workmen's compensation benefits. Although these benefits could be awarded only if he were as a matter of fact not employed in interstate commerce at the time of his injury, the Court held that his prior action did not bar a subsequent suit under the F.E.L.A., which required a determination that he *was* engaged in interstate commerce. The basis for this ruling was the fact that there had been no prior *adjudication* or admission concerning the plaintiff's employment in the compensation proceeding. Accord, e.g., *Waters* v. *Guile,* 6 Cir. 1916, 234 F. 532, 536; *Maxwell* v. *Kurn,* Mo. App. 1944, 180 S.W. 2d 249, reversed on other grounds, Mo. 1944, 185 S.W. 2d 9; *Hogan* v. *New York C. & H.R. Co.,* 2 Cir. 1915, 223 F. 890; *Schumacker* v. *Industrial Accident Commission,* 46 Cal. App. 295, 115 P. 2d 571, 574-575 (prior successful F.E.L.A. action does not estop subsequent compensation proceeding); *Bretsky* v. *Lehigh Valley R. Co.,* 2 Cir. 1946, 156 F. 2d 594; *Boatel, Inc.* v. *Delamore,* 5 Cir. 1967, 379 F. 2d 850, 855 (prior successful maintenance of state compensation action

does not preclude later jurisdictionally inconsistent Jones Act proceeding in absence of showing of "real contest" over jurisdictional issue or that it had "really been litigated" in the compensation proceeding); *Mike Hooks, Inc.* v. *Pena*, 5 Cir. 1963, 313 F. 2d 696 (same); *Wilkes* v. *Mississippi River Sand & Gravel Co.*, 6 Cir. 1953, 202 F. 2d 383 (same); *Gahagen Construction Corp.* v. *Armao*, 1 Cir. 1948, 165 F. 2d 301. That rule, which means simply that a party's—or really an attorney's—mistake in bringing an action which is jurisdictionally incorrect as a matter of law, cannot serve to deprive one of an available federal statutory remedy, is directly applicable here.[15]

REASONS FOR DENYING PETITION

The petition for writ of certiorari should not be granted because:

1. The decision sought to be reviewed is not shown to have been that of the "highest state court in which a decision could be had", under 28 U.S.C., § 1257.

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15. Contrary to the suggestion of the petitioner, there is no suggestion that the successive suits were maintained for any reason other than that Mrs. Hodge's original counsel had (along with the railroad) made a mistake as to the remedy jurisdictionally available to recover for Mr. Hodge's wrongful death. Moreover, although the relevance of the contention is not clear, the petitioner is wrong in suggesting that, under Florida Rule of Civil Procedure 1.110(g), alternative claims under the state law and the F.E.L.A. could have been maintained in one action. Under the rule, only a single "party" may join alternative causes of action. The Florida law is clear that a person acting in her individual capacity, such as Mrs. Hodge in the Florida wrongful death action, and one acting in a representative capacity, that is for Mr. Hodge's estate as required by the F.E.L.A., are not the same "party," but different ones who may not join in a single case. E.g., *General Dynamics Corp.* v. *Hewitt*, Fla. App. 1969, 225 So. 2d 561; *Fidelity-Philadelphia Trust Co.* v. *Ball*, Fla. App. 1968, 208 So. 2d 282.

2. The decision below involves a concurrence of factual and procedural factors—including a distinction as to the "parties" involved in the state law and F.E.L.A. actions, the failure of both parties to recognize the jurisdictional inapplicability of the state law proceeding, and the specific appellate waiver of the claim of "res judicata"—which render the decision below virtually unique, of little precedental effect and of no substantial interest or importance to anyone other than its particular parties.

3. The result reached in the decision sought to be reviewed is fully in accordance, on several alternative grounds, with prior determinations of this Court and of other federal courts concerning the issues presented.

CONCLUSION

It is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

ROBERT J. BECKHAM
1010 Concord Building
Miami, Florida 33130
Attorney for Respondent

Of Counsel:
HORTON, SCHWARTZ & PERSE
and
BECKHAM & MCALILEY
Miami, Florida 33130

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Brief of Respondent was mailed to Petitioner herein by placing same in the United States mail, properly addressed, postage prepaid, on this the 29th day of September, 1972, to the attorneys named below:

ADAM G. ADAMS, II
1116 Barnett Bank Building
Jacksonville, Florida 32202

DENNIS G. LYONS
DAVID BONDERMAN
1229 Nineteenth Street, N.W.
Washington, D. C.

.....
Attorney for Respondent

MICHAEL RODAK, JR

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-173

JACKSONVILLE TERMINAL COMPANY,
A CORPORATION,

Petitioner,

—v.—

IRIS HODGE, AS ADMINISTRATRIX OF THE
ESTATE OF JAMES L. HODGE, DECEASED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, OF THE STATE OF FLORIDA

REPLY BRIEF FOR PETITIONER

ADAM G. ADAMS, II
1116 Barnett Bank Building
Jacksonville, Florida 32202

DENNIS G. LYONS
DAVID BONDERMAN
1229 Nineteenth Street, N.W.
Washington, D. C. 20036

Attorneys for Petitioner

Of Counsel:

ADAMS & ADAMS
Jacksonville, Florida

ARNOLD & PORTER
Washington, D. C.

October, 1972

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1. The respondent suggests (Br. Op., pp. 12-14) that this Court is without jurisdiction to consider the petition for certiorari because the judgment of the District Court of Appeal was, she claims, not the decision of the "highest court of a State in which a decision could be had" as to the question presented in this case. The respondent suggests that the Florida Supreme Court had a "discretionary" power of review over the question presented here. (Br. Op., p. 13) The suggestion is not well taken.

The jurisdiction of the Florida Supreme Court may be "discretionary" as contended for by respondent, but that discretion, as respondent admits elsewhere (Br. Op., p. 12), only extends to cases where there is a "direct conflict" be-

tween decisions of District Courts of Appeal or between the decision of one District Court of Appeal and the Florida Supreme Court. The only general discretionary review power which the Florida Supreme Court has is the power to review cases "of great public interest"; but that power exists only where the question is first certified as such "by the District Court of Appeal." Fla. Const., Art. 5, §4(2), Pet. 29a. Here the Terminal Company requested the District Court of Appeal to make such a certification to obtain an opportunity for Supreme Court review but the District Court of Appeal refused.

Faced with this, respondent makes two tenuous suggestions as to a "direct conflict." (Br. Op., p. 13 n.10) The first theory of a direct conflict is that the decision of the court below conflicted with the well-established law in Florida under *Osborne* v. *Van Horn,* 2 Fla. Rep. 360 (1848), to the effect that a widow may "resort to the awards to the children in order to support them." (Br. Op., p. 13 n.10(a)) But this hardly conflicts with the opinion below which in pertinent part was to the effect that: "In an action by an administrator under FELA the estate must maintain the action for the use and benefit of the widow and the minor children." (Pet., Appendix A, p. 5a) It is hard to see where there is a conflict between the two provisions. The error made by the court below did not consist of any failure to follow *Osborne* v. *Van Horn,* but its failure to appreciate the fact that as a matter of federal law the conclusion it had reached that there was a difference in parties between Mrs. Hodge's two law suits was a conclusion based on form rather than substance. And under *Schendel,* the issue "must be determined as a matter of substance and not of mere form." *Chicago R.I. & Pac. R. Co.* v. *Schendel,* 270 U.S. 611, 618 (1926).

The other basis for an alleged "direct conflict" between the Florida District Courts of Appeal has to do with an issue relating to assumption of risk which the petitioner has abandoned. (Br. Op., p. 13 n.10(b)) Surely it cannot be the law that in order to present to this Court a petition for certiorari on the basic issue tendered by the present petition, petitioner was required first to tender to the Florida Supreme Court a petition for certiorari based on an entirely different issue.

Certainly there is no reason with respect to the certiorari jurisdiction of this Court to require petitioners seeking review of Florida state court judgments here to tender to the Florida Supreme Court petitions for certiorari in every case, in view of the fact that the Florida Supreme Court's discretionary certiorari jurisdiction (unlike this Court's) is so strictly limited by that State's constitution. Yet respondent comes close to making the suggestion that in every case this should be done. (Br. Op., p. 13) This Court recently addressed the specific problems caused by the limited jurisdiction of the Florida Supreme Court in *Nash* v. *Florida Industrial Comm'n,* 389 U.S. 235, 237 (1967). The Court there phrased the test as only whether it was "impossible for us to say that under Florida law petitioner . . . had any right to call upon the State Supreme Court for review." Where this Court was "unable to say that the District Court of Appeal was not the highest court in Florida wherein a decision could be had" (*Ibid.*), it upheld its own jurisdiction to review the case on certiorari, notwithstanding the failure of the petitioner there to apply for certiorari to the Florida Supreme Court. Clearly, in the absence of any "direct conflict" between Florida circuits on the point now tendered to this Court, that test is met here.

2. As to the substantive issues, there are two points emphasized in the Brief in Opposition to which petitioner believes a short reply is appropriate. As to the other points, we stand on the positions taken in the petition.[1]

(a) Identity of Parties. Both the lawsuits involved in the present litigation were brought by Mrs. Hodge. The first—state wrongful death—action was brought by Mrs. Hodge individually, seeking benefits which would have accrued to her personally and to her children, including as an item of damages sought the loss of support of her husband for the children. The second—FELA—action was brought by Mrs. Hodge in her capacity of administratrix of her husband's estate, the beneficiaries of which were herself and the children. Mrs. Hodge contends that the parties to the first and second lawsuits are not the same and that the Florida District Court of Appeal so determined as a matter of Florida law by which this Court is bound. (Br. Op., p. 18)

This case involves, of course, a determination of the right to invoke Federal legislation, the FELA. As such, it is the subject of Federal, not state, rules of decision. *Hogue* v. *Southern R. Co.*, 390 U.S. 516 (1968); *Maynard* v. *Durham*

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[1] One further point does require a brief comment. Mrs. Hodge suggests that there are certain procedural differences between a Florida common law negligence action and an FELA action which makes the state law action less favorable to the plaintiff than the FELA. (Br. Op., pp. 3-6) As demonstrated in our petition, pp. 10-11, this is not so. For example, Mrs. Hodge complains that under Florida negligence law, the railroad's negligence must be the proximate cause of the accident. (Br. Op., p. 5) But Mrs. Hodge fails to note that the same requirements exist under the FELA. See *Atlantic Coast Line R. Co.* v. *Gentry*, 46 So.2d 485 (Fla.), cert. denied, 340 U.S. 853 (1950). To the same end, Mrs. Hodge maintains that under Florida law "negative" testimony cannot be used to overcome "positive testimony." This simply reflects a misunderstanding of Florida law. See *Roberts* v. *Powell*, 137 Fla. 159, 185 So. 766 (1939). See also the language of the court below at pages 10a-13a in the petition.

& S. R. Co., 365 U.S. 160 (1961); *Jesionowski* v. *Boston & M. R. Co.*, 329 U.S. 457 (1947). In fact, the Florida District Court of Appeal, while stating that under Florida law the parties to the two suits were not the same, evidently thought that it was also following federal law in basing its holding upon *Troxell* v. *Delaware, L. & W.R. Co.*, 227 U.S. 434 (1913):

> The Federal Supreme Court [in *Troxell*] held that a judgment by a widow in her individual capacity which was prosecuted and tried on the theory that it involved a cause of action under state law, is not a bar to a subsequent action by the widow as administratrix brought under FELA. (Pet., Appendix A, pp. 4a-5a)

But as we have pointed out (Pet., pp. 8-13), in this respect *Troxell* has long since been repudiated. *Chicago, R.I. & Pac. R. Co.* v. *Schendel*, 270 U.S. 611 (1926). It is now clear, as a matter of Federal law, that a widow suing in her own behalf is, for the purposes of the FELA, the same person as a widow suing as administratrix of her deceased husband's estate. *Chicago, R.I. & Pac. R. Co.* v. *Schendel, supra; see also Landreth* v. *Wabash R. Co.*, 153 F.2d 98 (7th Cir. 1946).

This result is in no way changed by the formal addition of the children—upon whose behalf recovery was sought in the first action and who would have been the beneficiaries of a portion of any such recovery[2]—as parties

[2] Mrs. Hodge now suggests that the children were not beneficiaries of the first action and that the Florida District Court of Appeal so held. (Br. Op. pp. 13, 19) In fact, the District Court of Appeal held only that due to the differences in form under Florida law the parties to the two suits were different. (Pet., Appendix A, p. 5a) Neither Mrs. Hodge nor the District Court of Appeal quarreled with the long established Florida rule that had she prevailed in the first action, Mrs. Hodge would have recovered for loss of support for the children or that she would have been obligated to use that portion of the award for the support of the children. *Director Gen.*

[footnote continued on next page]

specifically allocated a portion of the judgment in the second suit. As this Court has noted, the identity of parties in FELA claims must be determined as "a matter of substance and not of mere form." *Chicago, R.I. & Pac. R. Co.* v. *Schendel, supra,* at 618. Both suits sought the recovery of the same damages for the same losses sustained by the widow and children. In both suits the beneficiaries were the same, even if Mrs. Hodge's title on the complaint was not. And in both suits the major share of the award sought was for Mrs. Hodge—indeed, having had her day in court when the first jury determined that she was not entitled to recover, she then was awarded $133,000 by the second jury.

There can be little doubt, then, as a matter of substance, that the parties to the two suits were identical and that the Florida District Court, in failing to apply the required federal standards set forth in *Schendel,* erred in concluding otherwise.

(b) Res judicata and collateral estoppel. Both the lawsuits involved in the present litigation concern the Terminal Company's liability to Mrs. Hodge for the accident which caused her husband's death. Mrs. Hodge's first suit was brought on the theory, unchallenged during the trial, that he was not in the course of his employment. When the first jury exonerated the railroad of liability, Mrs. Hodge pursued full appeals but never raised any question as to Hodge's employment status. Mrs. Hodge then brought the second suit, alleging that Hodge had been in the course of

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of Railroads v. *Into,* 83 Fla. 377, 91 So.2d 269 (1922); *Slaughter* v. *Cook,* 195 So.2d 6 (Fla. App. 1967); 24 Fla. Jur. 155, § 10. Nor, with respect to the FELA action's separate award to the children, is there any dispute that Mrs. Hodge may use its corpus for the children's support. *Osborne* v. *Van Horn,* 2 Fla. Rep. 360 (1848).

his employment at the time of this death, and seeking to relitigate the issues resolved against her in the first suit. While relitigation of these issues would normally be precluded by the doctrines of res judicata and collateral estoppel, Mrs. Hodge claims that because in the trial the court found Hodge had been in the course of his employment, the court which tried the first suit (the same court!) was without "jurisdiction" over the subject matter and hence neither res judicata nor collateral estoppel could apply. (Br. Op., pp. 21-23)[3]

It is obviously erroneous to analyze the matter in this fashion. To say that the Florida Circuit Court for Duval County lacked jurisdiction over Mrs. Hodge's suit for the death of her husband is patently absurd. For it is the Circuit Court for Duval County which rendered the second judgment, under the FELA, in Mrs. Hodge's favor, the judgment which she now seeks to uphold. The question clearly is not one of subject-matter jurisdiction—the Circuit Court clearly had it whether or not Hodge was in the course of his employment—but simply of the basis of relief available to Mrs. Hodge.

The cases cited by respondent (Br. Op., p. 22) are not in point. Respondent relies on several workmen's compensation cases in which the ruling of a state or Federal administrative agency was held not to be res judicata against a

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[3] Mrs. Hodge also claims, based upon fine distinctions not reflected in the case law, that the Terminal Company failed to preserve certain portions of its res judicata—collateral estoppel arguments. (Br. Op., pp. 9-10) This Court has recognized the close interrelationship of res judicata and collateral estoppel, *Ashe* v. *Swenson*, 397 U.S. 436 (1970); the Terminal Company contended at every stage of the proceedings below that it could not be sued a second time by Mrs. Hodge in her FELA action; and these arguments made by Terminal Company at all stages of this case are more than enough to preserve the res judicata—collateral estoppel point.

later FELA (or Jones Act) suit.[4] The administrative agencies obviously have no jurisdiction to award relief under the FELA. By contrast, the Circuit Court for Duval County had jurisdiction, whether Mr. Hodge was in the course of his employment or not, to award Mrs. Hodge a judgment for money damages for his death if she deserved one, either under the state Wrongful Death Act or the FELA.

Moreover, even if the question is viewed as one of "subject matter jurisdiction," as respondent claims, it is at most a question as to a "jurisdictional fact"—Hodge's status as in his employment or not at the time of the accident. It is well settled that a court has jurisdiction to determine its own jurisdiction, and that while such a determination is subject to review through the appellate process, it is not subject to collateral attack. *Durfee* v. *Duke*, 375 U.S. 106 (1963); *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U.S. 371 (1940); *Stoll* v. *Gottlieb*, 305 U.S. 165 (1938); *Dowell* v. *Applegate*, 152 U.S. 327 (1894); *Des Moines Nav. & R. Co.* v. *Iowa Homestead Co.*, 123 U.S. 552 (1887); *Skillern's Executors* v. *May's Executors*, 10 U.S. (6 Cranch) 153 (1810).

This is no less so because, rather than litigating the point, all parties to the first case assumed that jurisdiction was proper. For example, in *Skillern's Executors* v. *May's*

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[4] Not only do these cases involve the authority of administrative agencies rather than courts, but in most of the cases no final decision was ever made in the first suit. Thus, for example, in *Waters* v. *Guile*, 234 Fed. 532 (6th Cir. 1916), the parties had abandoned pursuit of the workmen's compensation scheme when they could not reach the agreement required by state law. And in *Boatel, Inc.* v. *Delamore*, 379 F.2d 850 (5th Cir. 1967), the Federal agency involved was held to be without jurisdiction on direct appeal. Interestingly, in *Boatel* all parties—including the court—appear to have assumed that if the issue were whether acts were or were not in the course of employment, collateral attack would be impossible. *Id.*, at 854.

Executors, supra, the plaintiff had failed to allege facts sufficient to demonstrate federal jurisdiction. Nonetheless, both parties litigated the case on the merits, and the case was carried on appeal to this Court without the jurisdictional issue being raised. After this Court's judgment became final, but before the lower court had carried out this Court's orders, the defendants sought to set aside the judgment for lack of jurisdiction. This Court held that jurisdiction was not subject to collateral attack where direct review had been open to the parties. 10 U.S., at 154.

Similarly, in *Chicot County Drainage Dist.* v. *Baxter State Bank, supra,* neither party had objected to the jurisdiction of the Federal Court in the first case. After this Court indicated in another suit that the federal court lacked jurisdiction over the type of dispute involved, one of the parties attempted to collaterally attack the judgment. This Court refused to allow such collateral attack:

> The court has authority to pass upon its own jurisdiction and its decree sustaining jurisdiction against attack, while open to direct review, is *res judicata* in a collateral action . . . . There can be no doubt that if the [jurisdictional] question . . . had actually been raised and decided by the District Court in the proceeding . . . that determination would have been final save as it was open to direct review on appeal. [Citation omitted.]
>
> The remaining question is simply whether respondents, having failed to raise the jurisdictional question in a proceeding to which they were parties and in which they could have raised it and had it finally determined, were privileged to remain quiet and raise it in a subsequent suit. Such a view is contrary to the well-settled principle that *res judicata* may be pleaded as a bar, not only as respects matters actually presented

> . . . but as to any matter which might have been presented . . . . (308 U.S., at 377-78)

This language is particularly applicable to Mrs. Hodge since she commenced the second suit, which in fact impugned the "jurisdictional facts" on which her first suit was based, while the first suit was still on appeal—of course not advising the appellate court of what she had done (Pet., p. 5).

In the present case, where Mrs. Hodge could have litigated the "jurisdictional" issue—or, put more practically, the factual issue of employment—in the first case—and could either have joined her two theories of action, state-law and FELA, in one suit or in two concurrent suits consolidated in the state court—but chose not to, she is by traditional principles of res judicata and collateral estoppel precluded from collaterally attacking the result of the first case.

CONCLUSION

For the reasons stated herein and in the petition for certiorari, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ADAM G. ADAMS, II
1116 Barnett Bank Building
Jacksonville, Florida 32202

DENNIS G. LYONS
DAVID BONDERMAN
1229 Nineteenth Street, N.W.
Washington, D. C. 20036

Attorneys for Petitioner

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